No. 99-474-CFX Title: Andrew S. Natsios, Secretary of Administration and Finance of Massachusetts, et al., Petitioners
v.
National Foreign Trade Council

Docketed:
September 20, 1999 Court: United States Court of Appeals for the First Circuit

Entry	Date	Proceedings and Orders
	Sep 20 1999	Petition for writ of certiorari filed. (Response due October 27, 1999)
	Sep 20 1999	Appendix also appendix to petition filed.
	Oct 15 1999	Order extending time to file response to petition until October 27, 1999.
	Oct 19 1999	Brief amici curiae of New York City Comptroller, et al. filed.
	Oct 20 1999	Brief amici curiae of Nonprofit Organizations Cntr.for Constitutional Rgts, et al filed.
	Oct 20 1999	Brief amici curiae of North Dakota, et al. filed.
	Oct 20 1999	Brief amici curiae of Members of Congress, Paul Wellstone, et al. filed.
	Oct 26 1999	Memorandum of respondent National Foreign Trade Council filed.
	Oct 27 1999	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
	Nov 9 1999	DISTRIBUTED. November 24, 1999
	Nov 29 1999	Petition GRANTED. SET FOR ARGUMENT March 22, 2000. **********
	Jan 10 2000	LODGING consisting of nineteen copies of Investor Responsibility Research Center, State and Local Selective Purchasing Laws as of Sept.1997 report submitted by counsel for both parties.
	Jan 12 2000	Joint appendix filed.
	Jan 12 2000	Brief of petitioner Andrew Natsios, Secretary of Administration and Finance filed.
	Jan 13 2000	Brief amici curiae of Council of State Governments, et al. filed.
	Jan 13 2000	Brief amici curiae of Nonprofit Organizations, Alliance for Democracy, et al. filed.
	Jan 13 2000	Brief amici curiae of Members of Congress, Barbara Boxer, et al. filed.
	Jan 13 2000	Brief amici curiae of Arkansas, et al. filed.
	Jan 13 2000	Brief amicus curiae of Coalition for Local Sovereignty filed.
	Jan 13 2000	Brief amici curiae of New York City Comptroller, et al. filed.
	Jan 26 2000	CIRCULATED.
	Feb 8 2000	Letter from Richard Ieyoub, Attorney General, withdrawing the state of Lousiana from the amici brief submitted by North Dakota, et al. received and distributed.
	Feb 10 2000	Application (99A642) of the Solicitor General for leave to file a brief as amicus curiae in excess of the page

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No. 99-474-CFX

Entry	Date	Proceedings and Orders
		limitations, submitted to Justice Breyer.
	Feb 11 2000	Application (99A642) granted by Justice Breyer, allowing a maximum of 40 pages.
	Feb 14 2000	Brief amicus curiae of United States filed.
	Feb 14 2000	Brief amicus curiae of Chamber of Commerce of the United States, et al. filed.
	Feb 14 2000	Brief of respondent National Foreign Trade Council filed.
	Feb 14 2000	Brief amicus curiae of Industry Coalition on Technology Transfer filed.
	Feb 14 2000	Brief amicus curiae of Washington Legal Foundation filed.
	Feb 14 2000	Brief amici curiae of Members of Congress, Douglas Bereuter, et al. filed.
	Feb 14 2000	Brief amici curiae of Associated Industries of Massachusetts, et al. filed.
	Feb 14 2000	Brief amici curiae of European Communities and their Member States filed.
	Feb 14 2000	Brief amici curiae of Gerald R. Ford, et al. filed.
	Feb 22 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 22 2000	Record filed.
	Mar 3 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Mar 6 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 6 2000	Record filed.
	Mar 10 2000	Reply brief of petitioners Andrew Natsios, Secr. Administration and Finance, et al. filed.
	Mar 22 2000	ARGUED.

Supreme Court, U.S.
FILED

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NO.

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

44 pp

QUESTIONS PRESENTED

A Massachusetts statute limits the authority of state agencies (but not private persons) to buy goods and services from persons who do business with Burma. This type of law is known as a "selective purchasing law." The questions presented are:

1. Whether economic sanctions against Burma enacted by Congress in 1996 -- three months after enactment of the Massachusetts Burma Law -- implicitly permit, or preempt, state and local selective purchasing laws regarding Burma.

2. Whether selective purchasing laws such as the Massachusetts Burma Law represent "market participation," not regulation, and are therefore exempt from claims based on the Foreign Commerce Clause and the foreign affairs power of the federal government.

3. Whether selective purchasing laws such as the Massachusetts Burma Law unconstitutionally interfere with the power of the federal government to conduct foreign affairs.

4. Whether selective purchasing laws such as the Massachusetts Burma Law discriminate against foreign commerce in violation of the Foreign Commerce Clause.

PARTIES TO THE PROCEEDING

The plaintiff is National Foreign Trade Council, Inc. (NFTC). According to the NFTC, it is a " nonprofit corporation; it issues no stock and has no parent corporations, subsidiaries or affiliates." The defendants are Andrew S. Natsios, the Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson, III, the state purchasing agent of the Commonwealth of Massachusetts. The defendants are sued solely in their official capacities.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, defendants Andrew S. Natsios, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and Philmore Anderson, III, State Purchasing Agent, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on June 22, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 181 F.3d 38 (1st Cir. 1999) and is reproduced in the separately bound appendix to this petition. The decision of the United States District Court is reported at 26 F. Supp.2d 287 (D. Mass. 1998) and is also reproduced in the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1999. Pet. App. 74. No rehearing or rehearing *en banc* was sought. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Plaintiff invoked and the court of appeals found jurisdiction pursuant to 28 U.S.C. § 1291. Petitioner no longer contests the standing of plaintiff to maintain this case. *See* Pet. App. 14 n.6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

The Congress shall have Power . . . [t]o provide for the common Defence . . .; [t]o regulate Commerce with foreign Nations . . . ; [t]o establish an uniform Rule of Naturalization . . . ; [t]o define and punish . . . Offences against the Law of Nations . . . ; [and] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . .

United States Constitution, Art. I, § 10

No State shall . . . enter into any Treaty, Alliance, or Confederation [or] grant letters of Marque or Reprisal . . . [or] without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [its] inspection Laws . . . . No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Art. II, § 2

The President shall be Commander in Chief . . . [and] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors . . . .

United States Constitution, Art. II, § 3

[The President] shall receive Ambassadors and other public Ministers . . . .

United States Constitution, Art. III, § 2

The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M

The full text of Mass. Gen. Laws Ann. (M.G.L.A.) ch. 7, §§ 22G-22M (West 1999 Supp.), appears at Pet. App. 88-94. Excerpts from the same sections appear in the Statement of the Case, below.

STATEMENT OF THE CASE

1. Procedural History

Plaintiff National Foreign Trade Council (NFTC) filed its complaint on or about April 30, 1998. The parties filed a stipulation of facts, cross-motions for summary judgment, and uncontested affidavits. Pet. App. 13-14. No party argued that a material fact was in dispute.

On November 4, 1998, the district court entered a memorandum and order granting summary judgment for the NFTC. Pet. App. 13-14, 75. The district court found that the Massachusetts Burma Law was not preempted by federal law, stating that the NFTC had "failed to carry [its] burden" to show preemption and that the "evidence does not establish sufficient actual conflict for th[e] court to find implied preemption." *Id.* at

85-86 (citation omitted). Nevertheless, the district court held that the Burma Law "impermissibly infringes on the federal government's power to regulate foreign affairs." *Id.* at 77. Quoting *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968), the court stated that the Massachusetts Burma Law "has more than an indirect or incidental effect in foreign countries" and a "great potential for disruption or embarrassment." Pet. App. 81. The sole evidence of "disruption or embarrassment" cited by the district court was the withdrawal of three companies from Burma and protests against the law filed by the European Union, the Government of Japan, and the Association of South East Asian Nations. Pet. App. 81-82. The district court did not reach the claim by the NFTC under the Foreign Commerce Clause. *Id.* at 86. On November 17, 1998, the court entered final judgment.

Petitioners timely appealed to the court of appeals, which affirmed. The court of appeals first noted that the parties "agreed" that "human rights conditions" in Burma "are deplorable." Pet. App. 5. The court nevertheless held that (1) "the law interferes with the foreign affairs power of the federal government"; (2) the law represents regulation, not market participation, and violates the Foreign Commerce Clause; and (3) the law "violates the Supremacy Clause because it is preempted by federal sanctions against Burma." *Id.*

The court summarized its decision as follows: "The passage of the Massachusetts Burma Law," the court said, "has resulted in significant attention being brought to the Burmese government's human rights record." Pet. App. 73. "Indeed, it may be that the Massachusetts law was a catalyst for federal sanctions." *Id.* "Nonetheless, the conduct of this nations's foreign affairs cannot be effectively managed on behalf of all of

the nation's citizens if each of the many state and local governments pursues its own foreign policy." *Id.* "Absent express congressional authorization," the court concluded, "Massachusetts cannot set the nation's foreign policy." *Id.*

2. Facts

A. The Massachusetts Burma Law

The Massachusetts Burma Law limits the procurement of goods and services by Massachusetts state agencies from persons who do business with Burma. The Burma Law was enacted in July, 1996, Mass. St. 1996, c. 130, and entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)." The Act is codified at M.G.L.A. c. 7, §§ 22G-M.

According to the United States Department of State, the "people of Burma continue to live under a highly authoritarian military regime that is widely condemned for its serious human rights abuses." 1st Cir. App. 336. In the months following enactment of the Massachusetts Burma Law in 1996, the United States, the European Union, and other countries imposed economic sanctions on Burma. *Id.* at 338, 342-48.

The Massachusetts Burma Law effectively requires state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do business with Burma. M.G.L.A. ch. 7, § 22H(d). The Law applies equally to state purchases of goods and services from persons domiciled in Massachusetts, other States, and foreign countries. The Burma Law does not apply to the purchase of

goods or services by private persons or prohibit contact between private persons and the Government of Burma.

Subject to certain exceptions, the Burma Law provides that "a state agency, a state authority, the house of representatives or the state senate may not procure goods or services from any person listed on the restricted purchase list maintained by the secretary [of administration and finance], or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed." M.G.L.A. ch. 7, § 22H(a). By its terms, the statute imposes "preference requirements" (§ 22I) rather than an absolute prohibition on state contracting with companies doing business in Burma. Thus, exceptions are authorized when the procurement is "essential" and enforcement of the restriction would "eliminate the only bid or offer, or would result in inadequate competition[,]" § 22H(b)(1) and (2); when the State is purchasing certain kinds of medical supplies, § 22I; or when there is "no comparable low bid or offer" by a bidder who is not on the list. § 22H(d). A "comparable low bid or offer" is defined as "a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service." § 22G. In practice, the "comparable low bid or offer" provision is applied by adding 10 percent to offers made by persons determined to be doing business with Burma. Pet. App. 7-8.

Section 22J(a) provides that the "secretary shall establish and maintain a restricted purchase list . . . [which] shall contain the names of all persons currently doing business with Burma (Myanmar)." "Doing business with Burma" is defined by § 22G as: "(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar)

or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary licensee or franchise[e] of such a person; (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement; (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar); (d) providing any goods or services to the government of Burma (Myanmar)." Under sections 22H(e) and 22I, persons with operations in Burma limited to the "reporting the news" or providing goods or services "for the provision of international telecommunications," or "providing only medical supplies" are exempt from the restrictions of the Act.

The Act directs the Secretary of Administration and Finance (the Secretary), "[i]n establishing the restricted purchase list," "to consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources." § 22J(b). "The Secretary shall also place the name of any person [on the list] who, in the statement [submitted to state agencies under section 22H], declared that he meets the criteria for being so listed." *Id.*

B. Federal Legislation Concerning Burma

Three months after Massachusetts enacted its Burma Law,

Congress authorized federal sanctions against Burma. *See* Pet. App. 10-12. The Omnibus Consolidated Appropriations Act of 1997 (the Federal Burma Law), Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 through 3009-167 (Section 570), approved September 30, 1996, imposed conditional sanctions on Burma "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government. . . ." § 570(a). The sanctions include an end to most bilateral assistance (§ 570 (a)(1)) and the opposition by the United States to most multilateral aid. *Id.* at § 570(a)(2).

Section 570 also authorizes and directs the President "to prohibit . . . United States persons from new investment in Burma, if [he] determines and certifies to Congress that, after the date of th[e] Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition." *Id.* at § 570(b). "New investment" is defined by the Act to include "the economical development of resources located in Burma" but does "not include the entry into, performance of, or financing of a contract to sell or purchase goods, services or technology." *Id.* at § 570(f)(2).

The Act further directs the President to "seek to develop, in coordination with members of the Association of Southeast Asian Nations (ASEAN) and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups

within Burma." *Id.* at § 570(c).

Finally, the Act requires the President to submit reports every six months to certain Congressional committees on: "(1) progress toward democraticizationin Burma; (2) progress on improving the quality of life of the Burmese people . . .; and (3) progress made in developing the [multilateral] strategy referred to in subsection (c) ['to bring democracy to and improve human rights practices . . . in Burma']." *Id.* at § 570(d).

C. Federal Executive Action Concerning Burma

On October 3, 1996, the President issued a proclamation entitled "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That Are Impeding the Transition to Democracy in Burma or Who Benefit from Such Policies." Proclamation No. 6925 (Oct. 3, 1996), 61 Fed. Reg. 52,233, 1996 U.S.C.A.A.N. at A83. The President stated that the "current regime in Burma continues to detain a significant number of duly elected members of parliament, National League of Democracy activists, and other persons attempting to promote democratic change in Burma." *Id.* The President further stated that the "regime has failed to enter into serious dialogue with the democratic opposition and representatives of the country's ethnic minorities . . . and has failed to meet internationally recognized standards of human rights." *Id.*

Seven months later, the President issued an Executive Order implementing section 570. Exec. Ord. 13047, 62 Fed. Reg. 28,301 (1997). In the Order the President "determine[d] and certif[ied] that, for purposes of [Section 570(b)], the Government

of Burma has committed large-scale repression of the democratic opposition in Burma after September 30, 1996, and further determine[d] that the actions and policies of the Government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and declare[d] a national emergency to deal with that threat." *Id.* Accordingly, the President "prohibit[ed] new investment in Burma by United States persons . . . ," subject to certain exceptions. *Id.*; *see also* 1st Cir. App. 338 (summarizing earlier unilateral United States sanctions, including "suspending economic aid, withdrawing GSP [General System of Preferences] . . . , implementing an arms embargo, blocking assistance from international financial institutions, downgrading our representation [from ambassador to charge d'affaires], and imposing visa restrictions on senior regime leaders and their families").

REASONS FOR GRANTING THE WRIT

For more than two hundred years, citizens of Massachusetts and other States have used boycotts to support the "natural, essential, and unalienable rights" of people around the world. *See* Mass. Const. of 1780, Pt. 1, art. 1 (West 1997 ed.); Charles McLean Andrews, *The Boston Merchants and the Non-Importation Movement* 17, 33-34, 40-41, 43, 55 (1968). The Massachusetts Burma Law closely resembles private boycotts and the scores of divestment and selective purchasing laws enacted by state and local governments in the 1980s concerning South Africa. The Massachusetts law is also similar to many current state and local laws and resolutions concerning Northern Ireland,

Cuba, Switzerland, and Nigeria -- laws and resolutions now at risk in light of the broad ruling of the court below.

Nothing in our federal Constitution denies to the States the right to apply a moral standard to their spending decisions. Not one constitutional grant, prohibition, or command requires the States to trade with dictators. In an era of global procurement and trade, state spending decisions will inevitably rile foreign countries and even risk embarrassment to the United States. These commonplaces, however, are not adequate grounds for constitutional judgments against selective purchasing laws. State laws that threaten national interests may be addressed by Congress, "whose voice, in th[e] area [of foreign affairs], is the Nation's." *Barclays Bank v. Franchise Tax Board*, 512 U.S. 298, 331 (1994). Absent clear and valid preemption of state law by Congress, the States should be free to choose their trading partners and indirectly seek to "secure the blessings of liberty" around the world. U.S. Const., Preamble.

I. THE CONSTITUTIONALITY OF SELECTIVE PURCHASING LAWS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Scores of Selective Purchasing and Similar Laws Enacted in the 1980s and 1990s Show the National Importance of the Questions Presented.

In this case "a United States court of appeals has decided an

important question of federal law that has not been, but should be, settled by this Court . . . ." United States Supreme Court Rule 10(c). The court of appeals acknowledged the national interest in the question presented. According to the court below, "[a]t least nineteen municipal governments have enacted analogous laws restricting their purchases from companies that do business with Burma. In addition, local jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, and other nations." Pet. App. 10; *see, e.g.*, New York City Admin. Code § 6-115.1 (Northern Ireland); § 6-115 (Burma); Los Angeles Admin. Code §§ 10.38 *et seq.* (Burma); San Francisco Admin. Code, Ch. 12J (Burma); Philadelphia Code § 17-104(b) (Burma); Mass. Gen. Laws Ann. ch. 22C-22F (West 1996 ed.) (Northern Ireland); Florida Stat. Ann. §§ 215.471 and 215.472 (Cuba); Vermont J.H.R. 157 (Joint Resolution Supporting National League for Democracy in Burma); Vermont Acts of 1999, ch. 13 (requiring state pension funds to support certain shareholder resolutions concerning business done in Burma). The court below noted further that "Massachusetts is not alone in its views regarding Burma and there is great potential for the proliferation of similar statutes." Pet. App. 24.

Selective purchasing laws have a long pedigree. In the New England and other colonies, the founding generation considered the nonimportation boycott to be a wise alternative to war. *See* Andrews, *supra*; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 Pa. L. Rev. 287, 330-35 (1990). In the 1980s, scores of state and local governments boycotted companies that did business with South Africa. Ultimately, twenty-three States and eighty cities enacted divestment or procurement laws intended to

promote human rights in South Africa. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l Law 821, 822 (1989); *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 562 A.2d 720, 744-49 (1989) (upholding constitutionality of divestment ordinance), *cert. denied*, 493 U.S. 1093 (1990); 10 Op. Off. Legal Counsel 49 (1986) (upholding state and local divestment and selective purchasing laws). During the same period, "Buy American" laws were enacted by approximately forty States, despite criticism by foreign countries and firms. *See Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (upholding Pennsylvania "Buy American" law), *cert. denied*, 501 U.S. 1212 (1991).

This long pedigree reflects the historic power of state and local governments to decide "with whom [they] will deal." *Reeves v. Stake*, 447 U.S. 429, 439 (1980) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The recurring use of selective purchasing and similar laws shows that this case should be resolved by this Court.

B. The Recent Rise in Global Commerce and International Trade Agreements Heightens the Need for Review of Claims that State Laws Unconstitutionally Interfere with Foreign Commerce and Foreign Affairs.

The importance of this case is underscored by increasing global commerce and a new generation of trade agreements.

Foreign trade has increased dramatically in recent years; improvements in communications and transportation have married the States to foreign firms and countries, for better or worse. Countless state and local laws now significantly affect foreign traders and investors. *See* Louis Henkin, *Foreign Affairs and the Constitution* 150 (1996 ed.).

Meanwhile, the United States has entered a new generation of agreements governing international trade and procurement. *See* North American Free Trade Agreement (NAFTA) Implementation Act, P.L. 103-182, 107 Stat. 2057 (1993), 19 U.S.C. §§ 3301 *et seq.*; Uruguay Round Agreement Act of 1994 (URAA), P.L. 103-465, 108 Stat. 4809, 19 U.S.C. § 3501 *et seq.* Under these agreements, Congress has purported to subject state laws to review by international bodies. Agreement Establishing the World Trade Organization (WTO), Annex 1B, art. 1, 33 I.L.M. 1144 (1994), 1169; 1994 U.S.C.A.A.N. at 4052; 19 U.S.C. § 3312 (NAFTA). Foreign countries have targeted dozens of state laws for attack. *See* European Commission, *Report on Barriers to Trade and Investment in the United States* (1997). The possibility of adverse action against the States under the GATT "impose[s] considerable new burdens and vulnerabilities" on the States. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1267 n.156 (1995). These burdens and vulnerabilities will increase dramatically if courts may rely on mere trade *complaints* as the basis for constitutional judgments against state laws.

In this case, the European Union and Japan have challenged the Massachusetts Burma Law under the GATT at the WTO. Pet. App. 10, 20, 24. Despite the fact that Congress has denied a

private right of action to enforce GATT in the courts of the United States (*see* 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1); 1994 U.S.C.A.A.N. at 4055), and the United States Trade Representative has pledged a strong defense of the Massachusetts law at the WTO (1st Cir. App. 425), the court below expressly based its constitutional holdings on the complaints made by the European Union and Japan. Pet. App. 24-26. The court's reliance on trade complaints -- inevitable rows in an era of global procurement -- grants to foreign countries and firms a "heckler's veto" against state laws. Absent review by this Court, foreign complaints under NAFTA and GATT will increasingly fuel constitutional claims against divestment and selective purchasing laws, "Buy American" laws, environmental regulations, and other state laws. These claims will sap the lawmaking powers of the States and unduly enlarge the role of the courts. The Court should grant certiorari to assess the effects of trade pacts and related federal laws on respondent's constitutional claims. *See Barclays*, 512 U.S at 324 & n.22, 326 (federal law may show that Congress has "implicitly permitted" state laws that affect foreign commerce; complaints by foreign countries do not establish unconstitutional interference with foreign commerce); *cf. Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (certiorari granted "because the cases involve important rights asserted in reliance upon federal treaty obligations").

C. The Constitutionality of Selective Purchasing Laws Has Not Been Decided by This Court, and a Split in the Circuits Now Exists on Whether the Market Participation Exception Applies to the *Foreign* Commerce Clause.

The Court has never decided the constitutionality of selective purchasing laws; the court below described the central issues in this case as "issues of first impression." Pet. App. 20. Although such laws concerning South Africa existed throughout this country (and the world) in the 1980s, no one challenged them in court. This Court denied review in a case sustaining a local *divestment* law: *Board of Trustees*, 562 A.2d at 740-757. In that case, the Maryland Court of Appeals upheld the Baltimore divestment ordinance against claims under the Supremacy, Foreign Commerce, and Foreign Affairs clauses -- the same clauses at issue here. This Court denied certiorari. 493 U.S. 1093 (1990). During the same period, the Court twice denied review in cases upholding so-called "Buy American" laws against similar claims. *See Trojan Technologies, Inc., supra, cert. denied*, 501 U.S. 1212 (1991); *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

The case repeatedly cited by the courts below -- *Zschernig v. Miller*, 389 U.S. 429 (1968) -- did not concern selective purchasing or divestment. In *Zschernig*, the Oregon statute at issue regulated the terms under which a nonresident alien could inherit property from an Oregon decedent. The state law prohibited inheritance by a nonresident alien unless three conditions were satisfied: (1) the alien's government must accord Americans the right to inherit on equal terms with its citizens; (2) the alien's government must give Americans the right to receive payment in the United States of funds from foreign estates; and (3) the nonresident alien must be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government. The Court concluded that this

type of probate law *as enforced in the Oregon courts* had "a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court stressed that the extensive record of enforcement of the statute by the Oregon courts showed a "*great potential for disruption or embarrassment*" in the conduct of foreign relations: the Oregon courts had repeatedly criticized the administration of foreign laws by foreign officials, questioned their credibility, and denied foreign citizens private inheritances based on "foreign policy attitudes" toward particular governments. *See* 429 U.S. at 435 (emphasis added).

Zschernig did not overrule *Clark v. Allen*, 331 U.S. 503 (1947), which upheld the facial validity of a California statute similar to the first two sections of the Oregon law. Although the California statute in *Clark* was clearly designed to influence foreign countries to change their laws to allow Americans to inherit, the Court dismissed the constitutional claim against the law as "farfetched." *Id.* at 517. Emphasizing that "rights of succession" were peculiarly a matter of local law, the Court agreed that "[w]hat California has done will have some incidental or indirect effect in foreign countries" but concluded "that is true of many state laws which none would claim cross the forbidden line." *Id.*

Neither *Zschernig* nor *Clark* addressed the exercise of state spending powers -- only the regulation of private inheritances. The court below stated that the "precise boundaries" of *Zschernig* "are not clear[,]" and "subsequent Supreme Court holdings have done little to clarify the reach of the Court's holding" in that case. Pet. App. 20, 30; *see* Recent Cases, 112 Harv. L. Rev. 2013, 2016 (1999) (noting "two different and inconsistent approaches" used

by lower courts to "apply the *Zschernig* effects test"). No case of this Court addresses the intersection of foreign affairs, state spending, and international trade agreements. *Compare Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983); *Barclays*, 512 U.S. at 310-31 (all reviewing state taxation under the Foreign Commerce Clause).

The Court *has* addressed state spending in cases applying the market participation exception to the domestic Commerce Clause. The Court has made clear that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983). The Court has reserved, however, the question whether the market participation exception to the Commerce Clause applies to claims under the *Foreign* Commerce Clause (*see Reeves v. Stake*, 447 U.S. at 438 n.9), and it has likewise never decided whether the exception applies to claims under the Foreign Affairs clauses. *See* 10 Op. Off. Legal Counsel at 50 n.4. ("Although the Court [in *Reeves v. Stake*] expressly reserved the question whether the market participation doctrine applies to the statutes that affect foreign, as opposed to interstate, commerce, we believe that the rationale for the distinction -- that the Commerce Clause was intended to restrict a state's ability to regulate but not its ability to participate in markets -- applies equally to statutes that affect foreign commerce."); 10 Op. Off. Legal Counsel at 63-64 (market participation doctrine should apply as well to claims under the federal foreign affairs power).

The decision below creates a split between the First and Third Circuits on whether the market participation doctrine

applies to the Foreign Commerce Clause. *Compare* Pet. App. 48-50 *with Trojan Technologies, Inc.*, 916 F.2d at. 909-13, *Board of Trustees*, 562 A.2d at 749-53 (quoting Laurence H. Tribe, *American Constitutional Law* § 6-21 (2d ed. 1988) at 469), and *K.S.B. Technical Sales Corp.*, 381 A.2d at 784-89.[1] The court below further stated its "disagree[ment]" with the decision of the district court in *Trojan Technologies, Inc.*, 742 F. Supp. 900, 902-03 (M.D. Pa.), *aff'd*, 916 F.2d 903 (3d Cir. 1990), "[t]o the extent that this case supports a market participant exception to the foreign affairs power" (Pet. App. 37n), and rejected the 1986 opinion of the Department of Justice (quoted above) on the same point. Pet. App. 37-38. The Court should grant the petition to resolve these splits of authority on the application of the market participation exception to the Foreign Commerce and Foreign Affairs clauses.

D. This Case Presents a Unique Opportunity to Resolve Questions Expressly or Implicitly Reserved by the Decisions in *Zschernig*, *Barclays*, and *Reeves v. Stake*.

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[1] The court below stated that "it is unlikely that the market participant exception applies to the foreign commerce clause" and expressly "decline[d]" to follow the three cases that have applied it to that clause. Pet. App. 48-49. Elsewhere the court stated that it "ch[o]se to leave" the "resolution" of this issue "to another day and another case." Pet. App. 50. The court's statements taken as a whole are sufficient to create a split of authority between the First Circuit and the Third Circuit and the state courts cited above.

"We deal here with the basic allocation of power between the States and the Nation." *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring). In *Zschernig* and *Barclays* the Court addressed the constitutionality of certain types of state laws alleged to interfere with foreign commerce and foreign affairs. These cases, however, addressed only state taxation and regulation, not a proprietary activity such as state spending. Meanwhile, in the period between *Zschernig* and *Barclays*, the Court applied the market participant exception to state spending and stressed its roots in principles of federalism. *See Reeves v. Stake*, 447 U.S. at 441; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807-10 (1976). This case lies at the intersection of lines leading from *Zschernig*, *Barclays*, and the market participation exception. The case is a unique opportunity to join these lines in a decision that would clarify the authority of the States to take action that has indirect foreign effects.

"*Zschernig* remains the only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power of the federal government." Pet. App. 30. The case remains "a unique statement and a sole application of constitutional doctrine." Louis Henkin, *Foreign Affairs and the Constitution* (1996 ed.) at 165. The doctrine has been questioned and the result in *Zschernig* attributed to Cold War tensions. *See id.* at 162 ("until 1968, there was no hint of such a principle"); *id.* at 165 & n. ("relic of the Cold War"); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1641-64 (1997).

The decision in *Barclays* sparked new attention in *Zschernig*. In *Barclays*, the Court upheld the California

"worldwide unitary" method of taxing multinational corporations, relying on Congress's failure to preempt and the "implicit permission" that failure represented. *Id.* at 324, 326, 329. The Court noted that the Constitution allocates to Congress the power to establish uniformity -- to "speak with one voice" in matters affecting foreign nations -- when it wishes to do so. *Id.* at 329. Where, however, Congress had failed to nullify the state tax at issue, despite vocal attacks by the Executive Branch, *id.* at 328-29, and a "battalion" of foreign countries, *id.* at 320, 324 n.22, the Court determined that Congress had implicitly permitted the law and thus protected it from a claim that it interfered with the conduct of foreign relations.

Thus, under *Barclays*, express Congressional *approval* of a state law affecting foreign affairs is not required for the Court to hold a state law constitutional: while the federal government must have the "*capacity*" to "speak with one voice" on foreign affairs when the national interest so requires, "Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential;' . . . it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminated against inter*state* commerce . . . ." *Id.* at 323 (emphasis added); *see also Dames & Moore v. Regan*, 453 U.S. 654, 682-83 & n.10 (1981).

Zschernig was not cited in *Barclays*, though it was cited in the briefs of both parties and in the oral argument of the United States as *amicus curiae* in that case. *See Barclays*, *supra*, 1993 WL 639306 (brief for petitioner), 1994 WL 135983 (brief for respondent), and 1994 WL 664950 at *13 (argument for United States). Commentators have understandably asked "whether

Barclays undercuts *Zschernig* or not." Pet. App. 33-35 & nn. 13, 14 (citing Goldsmith, *supra*, at 1700-01, and Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1848 (1998)). This petition squarely presents that question and an opportunity for this Court to address the interplay of *Zschernig*, *Barclays*, and the market participation exception. The Court should grant the petition and decide whether (1) the "implicit permission" found in *Barclays* may be shown by the later *enactment* of a non-preemptive federal law and (2) whether implicit Congressional permission forecloses constitutional claims under *Zschernig*. Finally, this selective purchasing case presents a unique opportunity to apply the market participant exception -- a doctrine firmly established by decisions of this Court -- to claims under the Foreign Commerce and Foreign Affairs Clauses.[2]

II. THE DECISION BELOW UNDULY EXPANDS *ZSCHERNIG* TO STRIKE STATE LAWS THAT HAVE NO DIRECT IMPACT ON FOREIGN AFFAIRS.

The court below conceded that "some degree of state involvement in foreign affairs is inevitable" and that "[i]n the governance of their affairs, states have variously and inevitably

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[2] For the reasons stated in Argument IV, below, the Court should also review the question whether the 1996 Federal Burma Law preempts state and local laws such as the Massachusetts Burma Law.

impinged on United States foreign relations." Pet. App. 18 (*quoting* Henkin, *supra*, at 162). The court accordingly stated the question as whether the Massachusetts law fell within "the boundaries of permissible state activity in the foreign affairs context." Pet. App. 18. In deciding this question, the court unduly expanded the holding of *Zschernig* to threaten state and local laws very different in kind and effect from the state law and actions involved in *Zschernig*.

The court below failed to grasp the key elements of state actions that directly interfere with foreign affairs. These elements are present in each of the state actions prohibited by Art. I, § 10, such as making treaties or declaring war. These actions were prohibited by the Framers because, as actions long associated with international sovereignty, they posed risks to the effective conduct of foreign affairs.

In contrast, the procurement of goods by a state government is not an aspect of international sovereignty. Whatever the intent of such a law, its center of gravity lies at home, not abroad. The court below misapplied *Zschernig* in invalidating a procurement law. Even if *Zschernig* enlarged the prohibitions on state conduct contained in Article I, § 10, the case must be read narrowly. By reading *Zschernig* broadly, the court below has subjected core state functions to *ad hoc* review of their international effects[3] and thus violated the principle that the "Constitution does not make

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[3] The breadth of the rule applied by the First Circuit deserves review by this Court. The court below deemed state interests irrelevant (Pet. App. 38-41) and adopted the view that the power of the national government over foreign affairs is not only plenary but exclusive and extra-constitutional. *Id.* at 38.

the judiciary the overseer of our government." *Barclays*, 512 U.S at 330 (quotation omitted). The decision thus should be reviewed by this Court.

III. THE MARKET PARTICIPATION EXCEPTION APPLIES TO THE FOREIGN COMMERCE AND FOREIGN AFFAIRS CLAUSES.

The Court should grant the petition and hold that the market participation exception applies to both the Foreign Commerce and Foreign Affairs clauses.

"When a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. at 208 (rejecting Commerce Clause challenge to City of Boston requirement that at least 50 percent of private workforce on all construction projects funded wholly by city must be Boston residents); *see Reeves, Inc. v. Stake*, 447 U.S. at 436-37 (upholding state law restricting sale of state-produced cement to state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 810 (upholding state "bounties" for scrap cars under law favoring state residents seeking bounties). The "market participant" doctrine stems from the fact that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc. v. Stake*, 447 U.S. at 437. Indeed, in light of the "long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,'" *id.* at 438-439 (quotation

omitted), the Court has reasoned that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* The doctrine rests on a "healthy regard for federalism and good government" rooted in the powers reserved to the States by the Tenth Amendment. *Id.* at 441.

The court below "decline[d]" to follow the federal and state courts that have applied the market participant exception to claims against state and local selective purchasing laws under the *Foreign* Commerce Clause. *See* pp. 19-20, *supra*. This was error because the rationale for the exception -- that the Commerce Clause was intended to restrict a State's ability to regulate but not its ability to participate in markets -- applies equally to statutes that affect foreign commerce. *See id.*

The court below similarly erred in not applying the market participation exception to claims that state action interferes with the ability of the federal government to conduct foreign affairs. As the Maryland Court of Appeals noted, "[T]he concerns which underlie the foreign Commerce Clause are closely related to the concerns underlying the limits on a state's authority to affect foreign policy." *Board of Trustees*, 562 A.2d at 752. The close relation between the clauses shows that the foreign affairs power -- no less than the foreign commerce power -- must be analyzed to determine whether it was intended by the Framers to constrain the proprietary power of the States. *Cf. Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282, 289-91 (1982)(market participant doctrine does not apply to preemption analysis under NLRA because comprehensive statutory scheme reflects intent to foreclose certain state action, but Commerce Clause does not

itself interfere with power of States to contract freely in market). In the absence of any such original intent, there is no constitutional basis for a judgment against a state's exercise of proprietary power, absent valid preemption by Congress.

The historical basis for the plenary federal power over foreign relations does not establish an intent to displace state proprietary power. The Framers were primarily concerned with congressional control over the exercise of state *regulatory* power affecting foreign affairs -- particularly tariffs. *See The Federalist* No. 22, at 144 (C. Rossiter ed. 1961); *id.* No. 23 at 153. They also barred state actions -- such as treaties or declarations of war -- long associated with international sovereignty. Each of these restrictions was adopted at a time when the law affirmed the right of a government to decide with whom it would deal. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). In light of the historical basis for the federal foreign affairs power and nature of selective purchasing laws, this petition presents a unique opportunity to apply the market participant doctrine to claims under both the foreign affairs and foreign commerce powers. *See* 10 Op. Office of Legal Counsel at 63 ("We do not think the *[Zschernig]* principle should be extended to state proprietal action").[4]

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[4] In holding that the Massachusetts law represents regulation and not market participation, the decision below also conflicts with the decisions of this Court in *Reeves, White*, and *Alexandria Scrap*. *See* Pet. App. 41-47. Petitioners seek certiorari on this issue but do not address it further in this petition. *See* Question Presented No.2, *supra*, p. ii; *see also South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 101-103

IV. THE COURT BELOW APPLIED A "STRONG PRESUMPTION" OF PREEMPTION THAT CONFLICTS WITH THE PRESUMPTION AGAINST PREEMPTION CONSISTENTLY APPLIED BY THIS COURT.

Finally, the court below "reject[ed] Massachusetts's claim that Congress has permitted the law" and found instead "that Congress has preempted the law." Pet. App. 59. The Court should grant certiorari and reverse this judgment because it inverts the normal presumption of validity of state law and conflicts with *Barclays*.

The court below conceded that the Federal Burma Law contains no express preemption clause. Pet. App. 64. However, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), it ruled that when "Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern." Pet. App. 69-70. This ruling inverts the presumption against preemption long applied by this Court and places on Massachusetts the burden of proving that Congress did *not* intend to preempt state and local laws on Burma.

This error should be reviewed by this Court. The historic

(1984)(Rehnquist, J., joined by O'Connor, J., dissenting)(Alaska law with foreign effects is market participation).

presumption against preemption applies equally to state laws governing purchasing decisions -- decisions deeply rooted in local affairs. The fact that selective purchasing laws also touch upon foreign affairs does not invert this settled presumption. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."); *United States v. Pink*, 315 U.S. 203, 230 (1942)("Even treaties . . . will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this Nation unless clearly necessary to effectuate the national policy.").

The presumption of preemption applied by the court below flatly conflicts with *Barclays*.[5] *Barclays* "requires no more than legislative inaction to establish" Congressional permission for state laws touching foreign affairs. *Id.* (Scalia, J., concurring). If Congressional *permission* for such state action may be shown merely by inaction, *preemption* must -- at the least -- overcome a presumption of validity and rest on a clear statement of federal

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[5] The court below found that the evidence of Congressional permission in this case was weaker than the evidence in *Barclays*. Pet. App. 60-63. The court erred in devaluing the strong evidence of permission present here and absent in *Barclays*: the fact that Congress *later enacted a law on the same subject but did not expressly preempt state law*. In light of the court's statement that "it may be that the Massachusetts law was a catalyst for federal sanctions" (Pet. App. 73), the court should have found that Congress "whose voice, in th[e] area [of foreign affairs], is the Nation's" (*Barclays*, 512 U.S. at 331), implicitly permitted laws such as the Massachusetts Burma Law.

intent. The clear statement rule should apply to foreign as well as domestic affairs to ensure that state governments have fair notice that a proposed law might preempt state action. This Court should grant review to clarify the proper standard of judicial review for preemption claims in cases where state laws affect foreign affairs.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

THOMAS F. REILLY
ATTORNEY GENERAL

Thomas A. Barnico*
James A. Sweeney
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2086

**Counsel of Record*

Dated: September 17, 1999

Supreme Court, U.S.
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(2)

No. 99 474

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

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United States Court of Appeals
For the First Circuit

No. 98-2304

NATIONAL FOREIGN TRADE COUNCIL,

Plaintiff, Appellee,

v.

ANDREW S. NATSIOS, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, in his official capacity as State Purchasing Agent for the Commonwealth of Massachusetts,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before
Lynch, Circuit Judge,
Coffin and Cyr, Senior Circuit Judges.

Thomas A. Barnico, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and James A. Sweeney, Assistant Attorney General, were on brief, for appellants.

Timothy B. Dyk, with whom Gregory A. Castanias, Jones, Day, Reavis & Pogue, Michael A. Collora, and Dwyer & Collora were on brief, for appellee.

Jonathan P. Hiatt and Deborah Greenfield on brief for amicus curiae American Federation of Labor and Congress of Industrial Organizations.

Loretta M. Smith, Cynthia L. Amara and New England Legal Foundation on brief for amici curiae Associated Industries of Massachusetts and Retailers Association of Massachusetts.

Zach Cowan, Acting City Attorney, and Christopher Alonzi, Deputy City Attorney, on brief for amicus curiae City of Berkeley, California.

Martin S. Kaufman, Edwin L. Lewis, III, and Atlantic Legal Foundation, Inc. on brief for amici curiae William E. Brock, Sam M. Gibbons, Alexander M. Haig, Jr., Lee H. Hamilton, Carla A. Hills, George P. Shultz, and Clayton Yeutter.

Deborah E. Anker, Peter Rosenblum, Anusha Rasalingam, and Harvard Law School Immigration and Refugee Clinic on brief for amici curiae Center for Constitutional Rights, Citizens for Participation in Political Action, The International Labor

Rights Fund, The New England Burma Roundtable, and The Unitarian Universalist Service Committee.

Daniel M. Price, Powell, Goldstein, Frazer & Murphy LLP, Robin S. Conrad, National Chamber Litigation Center, Inc., Jan Amundson, and Quentin Riegel on brief for amici curiae Chamber of Commerce of the United States of America, Organization for International Investment, National Association of Manufacturers, United States Council for International Business, American Insurance Association, American Petroleum Institute, and American Farm Bureau Federation.

Sara C. Kay, Associate General Counsel, Office of the Comptroller of the City of New York, on brief for amici curiae the Comptroller of the City of New York, the Cities of Los Angeles, California, Philadelphia, Pennsylvania, Oakland, California, Boulder, Colorado, Santa Cruz, California, and Newton, Massachusetts, the Towns of Amherst, Massachusetts and Carrboro, North Carolina, the City and County of San Francisco, California, and the County of Alameda, California.

George A. Hall, Jr. and Anderson & Kreiger LLP on brief for amici curiae Consumer's Choice Council, American Lands Alliance, Preamble Center, Institute for Agriculture and Trade Policy, Friends of the Earth, Humane Society of the United States, Defenders of Wildlife, and Rainforest Relief.

Richard L. Herz and Steven B. Herz on brief for amicus curiae EarthRights International.

Richard L.A. Weiner, David G. Leitch, Gil A. Abramson, and Hogan & Hartson L.L.P. on brief for amici curiae The European Communities and Their Member States.

Robert Stumberg, Matthew Porterfield, and Harrison Institute for Public Law, Georgetown University Law Center on brief for

amici curiae Members of Congress Sen. Edward Kennedy, Rep. David Bonior, Rep. Sherrod Brown, Rep. Michael Capuano, Rep. Peter DeFazio, Rep. William Delahunt, Rep. Lane Evans, Rep. Barney Frank, Rep. Marcy Kaptur, Rep. Dennis Kucinich, Rep. Edward Markey, Rep. James McGovern, Rep. Martin Meehan, Rep. Joseph Moakley, Rep. George Miller, Rep. Richard Neal, Rep. Robert Ney, Rep. John Olver, Rep. Ileana Ros-Lehtinen, Rep. Bernard Sanders, Rep. Janice Schakowsky, Rep. Christopher Smith, Rep. Ted Strickland, Rep. John Tierney, Rep. James Traficant, and Rep. Henry Waxman.

Charles Clark, W. Thomas McCraney, III, and Watkins & Eager, PLLC on brief for amici curiae Members of Congress Sen. Richard G. Lugar, Sen. Rod Grams, Sen. Craig Thomas, Sen. Pat Roberts, Rep. Calvin Dooley, Rep. Donald Manzullo, Rep. Amory Houghton, Rep. Michael G. Oxley, Rep. Doug Bereuter, and Rep. David Dreier.

Heidi Heitkamp, Attorney General of North Dakota, Bill Lockyer, Attorney General of California, J. Joseph Curran, Jr., Attorney General of Maryland, Philip T. McLaughlin, Attorney General of New Hampshire, Patricia A. Madrid, Attorney General of New Mexico, Eliot Spitzer, Attorney General of New York, John Cornyn, Attorney General of Texas, Hardy Myers, Attorney General of Oregon, and William H. Sorrell, Attorney General of Vermont, on brief for amici curiae States of North Dakota, California, New York, Texas, Oregon, New Mexico, New Hampshire, Vermont, and Maryland.

Daniel J. Popeo, R. Shawn Gunnarson, Evan Slavitt, and Gadsby & Hannah LLP on brief for amici curiae The Washington Legal Foundation, American Legislative Exchange Council, Rep. George N. Katsakiores, Rep. Howard L. Fargo, and New York

State Assemblyman Clifford W. Crouch.

June 22, 1999

LYNCH, Circuit Judge. The Commonwealth of Massachusetts appeals from an injunction restraining enforcement of the Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma.[1] We affirm the district court's finding that the law interferes with the foreign affairs power of the federal government and is thus unconstitutional. We also find that the Massachusetts Burma Law violates the Foreign Commerce Clause. We further find that the Massachusetts Burma Law violates the Supremacy Clause because it is preempted by federal sanctions against Burma. We affirm the injunction issued by the district court.

There is one matter on which the parties are agreed: human rights conditions in Burma are deplorable. This case requires no inquiry into these conditions.

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[1] Burma changed its name to Myanmar in 1989. However, because the parties and amici curiae in this case have largely used the name Burma, the statute at issue is known as the Massachusetts Burma Law, and the federal law refers to Burma, we use Burma throughout this opinion. This device is meant only for the ease of the reader and is not intended to express any view regarding the name Myanmar.

I

1. The Massachusetts Burma Law

In 1996, Massachusetts enacted "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)," ch. 130, 1996 Mass. Acts 239 (codified at Mass. Gen. Laws ch. 7, §§ 22G-22M, 40F½ (West Supp. 1998)) ("Massachusetts Burma Law"). The law restricts the ability of Massachusetts and its agencies and authorities[2] to purchase goods

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[2] The law defines "[s]tate agency" to include "all awarding authorities of the commonwealth, including, but not limited to, all executive offices, agencies, departments, commissions, and public institutions of higher education, and any office, department or division of the judiciary." Mass. Gen. Laws ch. 7, § 22G. The law defines "state authorit[ies]" to "include, but not be limited to" the following:

> Bay State Skills Corporation, centers of excellence, Community Economic Development Assistance Corporation, Community Development Finance Corporation, Government Land Bank, Massachusetts Bay Transportation Authority, Massachusetts Business Development Corporation, Massachusetts Capital Resource Company, Massachusetts Convention Center Authority, Massachusetts Corporation for Educational Telecommunications, Massachusetts educational loan authority, Massachusetts Health and Educational Facilities Authority, Massachusetts Higher Education Assistance Corporation, Massachusetts Housing Finance Agency, Massachusetts Horse Racing Authority, Massachusetts Industrial Finance Agency, Massachusetts Industrial Service Program, Massachusetts Legal

or services from individuals or companies that engage in business with Burma. The law requires the Secretary of Administration and Finance to maintain a "restricted purchase list" of all firms engaged in business with Burma. Mass. Gen. Laws ch. 7, § 22J. As the district court explained, companies may challenge inclusion on the list by submitting an affidavit stating that they do no business with Burma, but final determination as to whether a company is in fact "doing business" as defined by the law is made by the Executive Office's Operational Services Division. See National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 289 (D. Mass. 1998).

Under the law, Massachusetts and its agencies and authorities may not contract with companies on the restricted purchase list except in three situations: when procurement of the bid is essential and there is no other bid or offer, when the Commonwealth is purchasing certain medical supplies, or when

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> Assistance Corporation, Massachusetts Port Authority, Massachusetts Product Development Corporation, Massachusetts Technology Development Corporation, Massachusetts Technology Park Corporation, Massachusetts Turnpike Authority, Massachusetts Water Resources Authority, Nantucket Land Bank, New England Loan Marketing Corporation, pension reserves investment management board, State College Building Authority, Southeastern Massachusetts University Building Authority, Thrift Institutions Fund for Economic Development, University of Lowell Building Authority, University of Massachusetts Building Authority, victim and witness board, and the Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority.

Id.

there is no "comparable low bid or offer." Mass. Gen. Laws ch. 7, § 22H. The law defines a "[c]omparable low bid or offer" as an offer equal to or less than ten percent above a low bid from a company on the restricted purchase list. Id. § 22G. In practice, the law means that in most cases a company on the restricted purchase list can sell to Massachusetts only if the company's bid is for all practical purposes ten percent lower than all bids by companies not on the restricted purchase list. Before a company can bid on a Massachusetts contract, the law requires it to provide a sworn declaration disclosing any business it is doing with Burma. See id. § 22H.

> The law defines "doing business with Burma" to include:
> (a) having a principal place of business, place of incorporation or . . . corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;
>
> (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;
>
> (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);
>
> (d) providing any goods or services to the government of Burma (Myanmar).

Id. § 22G.

The law allows exceptions for entities "with operations in Burma (Myanmar) for the sole purpose of reporting the news, or solely for the purpose of providing goods or services for the provision of international telecommunications." Id. § 22H(e). The law also exempts firms whose business in Myanmar "is providing only medical supplies." Id. § 22I. The law does not impose any explicit limits on the ability of private parties to engage in business in Burma, or on the ability of private parties or local governments to purchase products from firms engaged in business in Burma. It does, however, effectively force businesses to choose between doing business in Burma or with Massachusetts. Massachusetts annually purchases more than $2 billion in goods and services.

The law does not include an express statement of purpose. In introducing the law to the legislature, the bill's sponsor, Rep. Byron Rushing, stated that the law established a selective purchase program because "if you're going to engage in foreign policy, you have to be very specific." Rep. Rushing also stated that the "identifiable goal" of the law was "free democratic elections in Burma." In signing the bill, then-Lieutenant Governor Cellucci stated that "[d]ue to a steady flow of foreign investments, including those of some United States companies, [the] brutal military regime [in Burma] has been able to supply itself with weapons and portray itself as the legitimate government of Burma. Today is the day that we call their bluff." Then-Governor Weld commented that "[o]ne law passed by one state will not end the suffering and oppression of the people of Burma, but it is my hope that other states and the Congress will follow our example, and make a stand for the cause of freedom and democracy around the world."

Massachusetts argued to the district court that the law "expresses the Commonwealth's own disapproval of the violations of human rights committed by the Burmese government" and "contributes to the growing effort . . . to apply indirect economic pressure against the Burma regime for reform."

Massachusetts also argued that the law reflects "the historic concerns of the citizens of Massachusetts" with supporting the rights "of people around the world." Massachusetts does not contend that the law is designed to provide any economic benefit to Massachusetts.

At the time the National Foreign Trade Council ("NFTC") filed its complaint, there were 346 companies on the restricted purchase list. Forty-four of these companies were United States companies. The law has generated protests from a number of this country's trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations ("ASEAN"). A number of companies have withdrawn from Burma in recent years; at least three cited the Massachusetts law as among the reasons for their withdrawal.

At least nineteen municipal governments have enacted analogous laws restricting purchases from companies that do business in Burma. In addition, local jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, and other nations.

2. Federal Sanctions Against Burma

Congress imposed sanctions on Burma three months after Massachusetts passed the Massachusetts Burma Law. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009-121 to 3009-172 (1996)) ("Federal Burma Law").[3] The federal law provides for sanctions to remain in place "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government." Id. § 570(a). The federal legislation is divided into five primary parts.

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[3] We refer to the federal law as the Federal Burma Law only for the convenience of the reader.

First, the statute bars any "United States assistance to the Government of Burma," except for humanitarian assistance, assistance for anti-narcotics efforts, or "assistance promoting human rights and democratic values." Id. § 570(a)(1). This first part of the statute also instructs the Secretary of the Treasury to oppose any "loan or other utilization of funds" by international financial institutions and bars most Burmese officials from entering the United States unless required by treaty. Id. § 570(a)(2), (3).

Second, the federal law authorizes the President to impose conditional sanctions. The law states:

> The President is hereby authorized to prohibit, and shall prohibit United States persons from new investment in Burma, if the President determines and certifies to Congress that, after the date of enactment of this Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition.

Id. § 570(b). The law defines "new investment" to include a range of activity concerning "the economical development of resources located in Burma." Id. § 570(f)(2). However, "'new investment' does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." Id.

Third, the federal law instructs the President to work with "members of ASEAN and other countries having major trading and investment interests in Burma" to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups

within Burma." Id. § 570(c). Fourth, the law instructs the President to report to Congress on conditions in Burma and on progress made in furthering a multilateral strategy. See id. § 570(d). Fifth, the law grants the President the power to waive any of the sanctions if "he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." Id. § 570(e).

In May 1997, President Clinton issued an Executive Order pursuant to the Federal Burma Law imposing trade sanctions on Burma. See Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997); see also 31 C.F.R. Pt. 537 (1998) (regulations implementing sanctions authorized by the President's Executive Order). The President determined and certified that

> for purposes of section 570(b) of the [Federal Burma Law], the Government of Burma has committed large-scale repression of the democratic opposition in Burma . . . [and] the actions and policies of the Government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

62 Fed. Reg. at 28,301. The President declared "a national emergency to deal with [the] threat." Id. The Executive Order prohibited new investment, as defined by the Federal Burma Law, by "United States persons" and prohibited United States persons from approving or facilitating new investment in Burma by foreign persons. Id. Like the Federal Burma Law, the Executive Order explicitly exempts contracts "to sell or purchase goods, services, or technology," provided such transactions are not to guarantee, support, or make payments related to the development of resources in Burma. Id.

3. District Court Proceedings

The NFTC, a nonprofit corporation representing member companies that engage in foreign trade, filed suit on April 30, 1998, seeking declaratory and injunctive relief against two Massachusetts officials.[4] The NFTC contended that the Massachusetts Burma Law unconstitutionally interfered with the federal foreign relations power, violated the Foreign Commerce Clause, and was preempted by the Federal Burma Law.

Thirty-four NFTC members are on Massachusetts's most recent restricted purchase list. Three NFTC members withdrew from Burma after the passage of the Massachusetts law, citing the law as the reason for their decision to cease doing business in Burma.[5] One current NFTC member has had a bid for a procurement contract in Massachusetts increased by ten percent pursuant to the law.

The district court found that the Massachusetts Burma Law unconstitutionally infringed on the foreign affairs power of the federal government and thus granted declaratory and injunctive

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[4] The NFTC brought suit against Charles D. Baker, then Secretary of Administration and Finance of the Commonwealth of Massachusetts, and Philmore Anderson, III, the State Purchasing Agent for the Commonwealth of Massachusetts. Frederick Laskey subsequently replaced Baker as Secretary of Administration and Finance, and was Secretary at the time this appeal was taken. Andrew S. Natsios is currently the Secretary.

[5] Two other NFTC members also severed business with Burma, citing human rights concerns as the reason for their decisions.

relief.[6] See National Foreign Trade Council, 26 F. Supp. 2d at 289; National Foreign Trade Council v. Baker, No. 98-10757 (D. Mass. Nov. 17, 1998) (order granting relief). The court also found that the NFTC had not met its burden of showing that the Federal Burma Law preempted the Massachusetts Burma Law. The district court did not consider the NFTC's argument that the Massachusetts law also violates the Foreign Commerce Clause. See id. at 293.

4. Standard of Review

The district court ruled on cross-motions for summary judgment, on stipulated facts and uncontested affidavits. The decision turned entirely on questions of law. This court thus reviews the district court's determinations de novo. See Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 61-62 (1st Cir. 1997).

II

1. The Foreign Affairs Power of the Federal Government

We begin with a review of the Constitution's grant of power over foreign affairs to the political branches of the federal government. The Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, "[t]o regulate

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[6] The district court also found that the NFTC had standing to challenge the law. See National Foreign Trade Council, 26 F. Supp. 2d at 289-90. Massachusetts does not renew its challenge to the NFTC's standing on appeal. We have reviewed the district court's determination on the standing issue and we find that it was correct.

Commerce with foreign Nations," id. cl. 3, "[t]o establish an uniform Rule of Naturalization," id. cl. 4, "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," id. cl. 10, and "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," id. cl. 11. In addition, "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Id. § 9, cl. 8. Finally, "[t]he Congress shall have Power to declare the Punishment of Treason." Id. art. III, § 3, cl. 2.

The Constitution declares that the President shall be Commander in Chief, id. art. II, § 2, cl. 1, and, with the advice and consent of the Senate, grants him the power "to make Treaties" and to "appoint Ambassadors," id. cl. 2. Additionally, the President "shall receive Ambassadors and other public Ministers." Id. § 3.

The states are forbidden to "enter into any Treaty, Alliance, or Confederation" or to "grant Letters of Marque and Reprisal," id. art. I, § 10, cl. 1, may not "without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [their] inspection Laws," id. cl. 2, and may not, "without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay," id. cl. 3.

The Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government. James Madison commented that "[i]f we are to be one nation in any

respect, it clearly ought to be in respect to other nations." The Federalist No. 42, at 302 (James Madison) (B.F. Wright ed., Barnes & Noble Books 1996); see also id. at 303 (noting that the Articles of Confederation, by failing to contain any "provision for the case of offences against the law of nations," left "it in the power of any indiscreet member to embroil the Confederacy with foreign nations"). Alexander Hamilton, discussing state regulation of foreign commerce, noted that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Id. No. 22, at 192 (Alexander Hamilton); see also id. No. 45, at 328 (James Madison) (stating that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined," and "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce").[7] Justice Taney echoed Madison's and Hamilton's views in Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840), commenting that "[i]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation." Id. at 575 (opinion of Taney, J.).

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[7] As the Supreme Court has indicated, The Federalist is "usually regarded as indicative of the original understanding of the Constitution." Printz v. United States, 117 S. Ct. 2365, 2372 (1997).

Indeed, the Supreme Court has long held that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." United States v. Pink, 315 U.S. 203, 233 (1942). In The Chinese Exclusion Case, for example, the Court commented that "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nationals, we are but one people, one nation, one power." Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889). In Hines v. Davidowitz, 312 U.S. 52 (1941), the Court stated that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Id. at 63; see also United States v. Belmont, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear."). As the Court explained in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), when it comes to foreign affairs, the powers of the federal government are not limited: "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." Id. at 315-16 (emphasis added).

Federal dominion over foreign affairs does not mean that there is no role for the states. A limited role is granted by the Constitution, as discussed earlier. See Restatement (Third) of Foreign Relations Law of the United States § 201 reporters' note 9 (commenting that "[u]nder the United States Constitution, a State of the United States may make compacts or agreements with a foreign power with the consent of Congress (Article I, Section 10, clause 2), but such agreements are limited in scope and subject matter" and that "[a] State may make some agreements with foreign governments without the consent of Congress so

long as they do not impinge upon the authority or the foreign relations of the United States"). Indeed, Massachusetts itself maintains twenty-three "sister state" and other bilateral agreements with sub-national foreign governments and trade promotion organizations. As one learned commentator explains, some degree of state involvement in foreign affairs is inevitable: "[i]n the governance of their affairs, states have variously and inevitably impinged on U.S. foreign relations." L. Henkin, Foreign Affairs and the United States Constitution 162 (2d ed. 1996).

The central question is whether the state law runs afoul of the federal foreign affairs power as interpreted by the Supreme Court in Zschernig v. Miller, 389 U.S. 429 (1968), the case in which the Supreme Court has most directly considered the boundaries of permissible state activity in the foreign affairs context.

2. The Decision in Zschernig

In Zschernig, the Supreme Court invalidated an Oregon statute that barred a non-resident alien from taking property by testamentary disposition or succession unless he showed the existence of three conditions: 1) "the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the [alien's] foreign country"; 2) the right of United States citizens to "receive payment here of funds from estates in the foreign country"; and 3) "the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.'" Id. at 430-31 (quoting Ore. Rev. Stat. § 111.070 (1957)). If these requirements were not fulfilled and there were no other heirs, the Oregon property would escheat to the state. In Zschernig, the sole heirs to the estate of an Oregon resident who had died intestate in 1962 were residents of East Germany, and thus Oregon's State Land Board had petitioned for the escheat of

the proceeds of the estate. See id. at 430. The Court held that the statute was "an intrusion by [Oregon] into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Id. at 432.

The Zschernig Court distinguished the law at issue from a similar California statute previously upheld in Clark v. Allen, 331 U.S. 503 (1947). The California statute was upheld against a facial challenge. In contrast, the challenge to the Oregon statute involved "the manner of its application." Zschernig, 389 U.S. at 433. The Supreme Court stated in Zschernig that "[h]ad [Clark] appeared in the posture of the present [case], a different result would have obtained." Id. As the Court explained, the problem with the Oregon law was not that it required courts to inquire into foreign law -- for "[s]tate courts, of course, must frequently read, construe, and apply laws of foreign nations," id., but was rather that probate courts had used the reciprocity requirement to "launch[] inquiries into the type of governments that obtain in particular foreign nations," id. at 434. The Oregon statute had "led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should not preclude wonderment as to how many may have been denied the right to receive." Id. at 435 (internal quotation marks omitted). Such evaluations "affect[] international relations in a persistent and subtle way," the Court found, and thus "may well adversely affect the power of the central government to deal with" problems of international relations. Id. at 440-41.

The district court found the Massachusetts Burma Law invalid under Zschernig. The court interpreted Zschernig to stand for the proposition that "states and municipalities must yield to the federal government when their actions affect significant issues of foreign policy." National Foreign Trade Council, 26 F. Supp. 2d

at 291. The court stated that because the Massachusetts law "has more than an 'indirect or incidental effect in foreign countries,'" and has a "'great potential for disruption or embarrassment,'" it unconstitutionally infringes on the federal government's foreign affairs power. Id. (q ng Zschernig, 389 U.S. at 434-35). The district court noted that the law was enacted solely to sanction Burma so as to pressure the Burmese government to change its domestic policies, and that the views of the European Union and ASEAN demonstrated that the law was having a "disruptive impact on foreign relations." Id.

The precise boundaries of the Supreme Court's holding in Zschernig are unclear.[8] Nonetheless, we agree with the district court that the Massachusetts Burma Law is unconstitutional under Zschernig. Because the parties' arguments raise issues of first impression, we consider these arguments in detail.

Massachusetts's arguments that the district court erred can be divided into two lines of attack. First, Massachusetts attempts to distinguish the facts in Zschernig from the facts of this case, and

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[8] As Professor Henkin comments:

> It may prove that Zschernig v. Miller excludes only state actions that reflect a state policy critical of foreign governments and involve "sitting in judgment" on them. Even if so limited, the doctrine might cast doubts on the right of the states to apply their own "public policy" in transnational situations. Or was the Court suggesting different lines -- between state acts that impinge on foreign relations only "indirectly or incidentally" and those that do so directly or purposefully? Between those that "intrude" on the conduct of foreign relations and those that merely "affect" them?

Henkin, supra, at 164 (footnotes omitted).

to argue that the Zschernig Court recognized the need to balance state interests against possible harm resulting from state intrusion in foreign affairs. This balance, says Massachusetts, weighs in favor of the Massachusetts law being found constitutional. Second, Massachusetts in effect argues that Zschernig is weak precedent. In particular, Massachusetts contends that the Supreme Court's decision in Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994), demonstrates that the Supreme Court's holding in Zschernig is limited. The NFTC, in turn, contends that the Massachusetts Burma Law constitutes far greater interference in foreign affairs than did the law under attack in Zschernig, and argues that Massachusetts is in effect asking this court to overrule Zschernig.

First, Massachusetts attempts to distinguish Zschernig by arguing that the Court struck down the Oregon law as applied, and did not question the ability of states to enact laws that indirectly affect foreign affairs. Massachusetts argues that its law does not entail nearly the degree of ongoing scrutiny or criticism of foreign government action by the state that the Oregon law entailed. Massachusetts contends that Zschernig left intact the holding in Clark, although the law there was also designed to influence the behavior of foreign countries. Indeed, Clark expressly stated that the fact that a state law has "incidental or indirect effect in foreign countries" does not make the law invalid. Clark, 331 U.S. at 517. According to Massachusetts, the district court incorrectly read Zschernig to stand for the proposition that a state law that goes beyond an incidental or indirect effect on foreign affairs is impermissible, and Zschernig instead stands for the proposition that courts must weigh the degree of impact against the particular state interest at issue.

Massachusetts further argues that its law is concerned with expressing its moral views regarding conditions in Burma, that its desire to disassociate Massachusetts from Burma's human rights

violations is a valid purpose of the law, and that Massachusetts would have enacted the law regardless of whether it believed that the law would result in change in Burma.

Massachusetts's arguments fail under Zschernig. The Massachusetts Burma Law clearly has more than an "incidental or indirect effect in foreign countries." We do not read Zschernig as instructing courts to balance the nation's interests in a unified foreign policy against the particular interests of an individual state. Instead, Zschernig stands for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed. As Zschernig stated:

> The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations.

Id. at 440-41 (emphasis added) (citations omitted). Zschernig did not hold, as Massachusetts argues, that a sufficiently strong state interest could make lawful an otherwise impermissible intrusion into the federal government's foreign affairs power.

Massachusetts makes another preliminary argument which we reject. It attempts to distinguish the instant case from Zschernig based on the level and frequency of scrutiny that the Massachusetts law entails. This argument is largely beside the point. Further, the argument fails even on its own terms. It is beside the point because the effect of the law is not measured solely by the level or frequency of scrutiny. Every decision by a company to withdraw from or not seek new business in Burma has an ongoing impact every bit as corrosive as scrutiny.

Massachusetts correctly notes that its courts are not engaging in ongoing evaluations of the situation in Burma; nor does the law permit or encourage such inquiries. Yet while the statute itself creates no mechanism for the Massachusetts courts or legislature to evaluate conditions in Burma on an ongoing basis, the law quite clearly establishes ongoing scrutiny. The Massachusetts law creates a mechanism for ongoing investigation into whether companies are doing business with Burma: every time a firm bids for a Massachusetts procurement contract, Massachusetts inquires into whether that firm does business in Burma. The scrutiny involved here is not of human rights conditions alone. By investigating whether certain companies are doing business with Burma, Massachusetts is evaluating developments abroad in a manner akin to the Oregon probate courts in Zschernig.

The conclusion that the Massachusetts law has more than an incidental or indirect effect on foreign relations is dictated by the combination of factors present here: (1) the design and intent of the law is to affect the affairs of a foreign country; (2) Massachusetts, with its $2 billion in total annual purchasing power by scores of state authorities and agencies, is in a position to effectuate that design and intent and has had an effect; (3) the effects of the law may well be magnified should Massachusetts prove to be a bellwether for other states (and other governments); (4) the law has resulted in serious protests from other countries, ASEAN, and the European Union; and (5) Massachusetts has chosen a course divergent in at least five ways from the federal law, thus raising the prospect of embarrassment for the country.

Our discussion of the facts demonstrates the first two of these factors; the fifth factor is discussed in our preemption analysis later in this opinion. We turn to the third and fourth factors.

The threat to federal foreign affairs power is magnified when Massachusetts is viewed as part of a broader pattern of state and

local intrusion. Under Zschernig, the effect of state and local laws should not be considered in isolation; rather, courts must consider the combined effects of similar laws in numerous jurisdictions. In determining whether the Oregon law was likely to have a significant effect on the nation's foreign affairs, the Supreme Court noted that "[i]t now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations." Id. at 433-34. Massachusetts is not alone in its views regarding Burma and there is great potential for the proliferation of similar statutes. Many municipalities have passed laws akin to the Massachusetts Burma Law, whether targeting Burma or some other country with disfavored policies, and amici inform us that other states and large cities are waiting in the wings. This country has, we are told, 39,000 governments at levels other than the federal government, some twenty of which have participated in the briefs amici curiae here.

We also consider the protests received from this country's allies and trading partners. A European Union official stated that the Massachusetts Burma Law is "an attack on international law." An ASEAN official commented that ASEAN is "dismayed by this trend [of sub-national laws targeting Burma], because you cannot negotiate with states and provinces." We reject Massachusetts's claim that we should ignore the fact that foreign nations have objected to the Massachusetts Burma Law.[9] In

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[9] Massachusetts similarly argues that the district court erred in looking to State Department comments regarding the Massachusetts law. As Massachusetts contends, the Supreme Court has at times discounted federal Executive Branch positions. See Zschernig, 389 U.S. at 434-35; see also Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159,

Zschernig, the Supreme Court expressly cited Bulgaria's objections to the Oregon law as evidence of the fact that the law was affecting foreign relations. See id. at 436-37, 437 n.7. The Zschernig Court also noted the "great potential for disruption or embarrassment" caused by the Oregon law. Id. at 435. The protests of America's trading partners are evidence of the great potential for disruption or embarrassment caused by the Massachusetts law.

Massachusetts points to two sources to support its claim that, when examining whether a state or local law intrudes on the federal government's foreign affairs power, United States courts

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195-96 (1983) (stating that an Executive Branch decision not to file an amicus brief opposed to the state tax in question was "by no means dispositive," but that "when combined with all the other considerations we have discussed, it does suggest that the foreign policy of the United States . . . is not seriously threatened" by the state law in question). Indeed, in Barclays, the Supreme Court expressly considered the force of "Executive Branch actions -- press releases, letters, and amicus briefs," stating that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." Barclays, 512 U.S. at 329-30. Massachusetts is correct that Executive Branch views are not dispositive. In this case, however, this court's own inquiry leads to the conclusion that the law impermissibly interferes with the federal government's foreign affairs power.

While there have been conflicting Executive Branch statements regarding the effect of the Massachusetts Burma Law and similar laws, the Executive Branch has not taken an official position in this litigation.

should simply ignore foreign government objections. First, Massachusetts notes that the federal law implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) denies foreign governments and private persons the right to challenge state laws based on the GATT. See Uruguay Round Agreements Act, Pub. L. No. 103-465. § 102, 108 Stat. 4809, 4815-19 (1994) (codified at 19 U.S.C. § 3512 (West Supp. 1999)). Massachusetts contends that, given this provision, objections from foreign states to the Massachusetts law should not be considered.[10] This argument is inapposite: this action has not been brought pursuant to the GATT or any World Trade Organization agreement, and the NFTC does not argue that the law should be invalidated because of a conflict with any international trade agreement or treaty.

Second, Massachusetts claims that Barclays rejected reliance on the views of our trading partners. We disagree with Massachusetts's interpretation of Barclays. Setting aside our view, discussed further below, that Barclays does not apply outside the context of Commerce Clause challenges to laws that do not target specific foreign nations or foreign commerce, Barclays does not stand for the proposition that courts should ignore foreign government objections. While the Supreme Court in Barclays found foreign government views to be unpersuasive, it did not ignore such views. See Barclays, 512 U.S. at 324 n.22, 327-28. The message of Barclays is thus consistent with Zschernig: foreign government views, although not dispositive,

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[10] The NFTC asserts that this argument was not raised below, and that there is nothing in the Agreements Act suggesting that it forecloses constitutional remedies. The NFTC misinterprets Massachusetts's argument, which is that the court should not look to foreign government views of the state law (not that constitutional challenges are per se barred).

are one factor to consider in determining whether a law impermissibly interferes with the federal government's foreign affairs power.

The preemption analysis later in this opinion outlines the inconsistencies and conflicts between the Massachusetts Burma Law and the Federal Burma Law. The point for Zschernig purposes is distinct. The Massachusetts law presents a threat of embarrassment to the country's conduct of foreign relations regarding Burma, and in particular to the strategy that the Congress and the President have chosen to exercise. That significant potential for embarrassment, together with the other factors listed above, drives the conclusion that the Massachusetts Burma Law has more than an "incidental or indirect effect" and so is an impermissible intrusion into the foreign affairs power of the national government.

3. Applications of Zschernig

Our approach to this case is largely consistent with that taken by the few other courts that have considered challenges to state and local laws brought under Zschernig. These cases have generally fallen into two categories: challenges to the application of laws targeting specific foreign states, most often South Africa, and challenges to state "buy-American" laws.

In New York Times Co. v. City of New York Commission on Human Rights, 361 N.E.2d 963 (N.Y. 1977), the court found that New York could not apply local anti-discrimination laws to prohibit the New York Times from carrying an advertisement for employment opportunities in South Africa. Under Zschernig, the court said that "[e]ven longstanding state regulation of traditional fields of law . . . must fall by the wayside if enforcement of State regulations would 'impair the effective exercise of the Nation's foreign policy.'" Id. at 968 (quoting Zschernig, 389 U.S. at 440).

Similarly, in Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300 (Ill. 1986), the Illinois Supreme Court invalidated a state statute that had excluded South African coins from state tax exemptions applying to coins and currency issued by all other nations. The court found that the "sole motivation [for the law] was disapproval of a nation's policies" and that the legislation effectively "impose[d], or at least encourage[d], an economic boycott of the South African Krugerrand," and thus was "outside the realm of permissible state activity." Id. at 307; see also Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1376-80 (D.N.M. 1980) (finding that a state university's decision to bar admission or readmission of Iranian students could affect international relations and thus was impermissible).

In contrast, in Board of Trustees of the Employees' Retirement System of Baltimore v. Mayor and City Council of Baltimore, 562 A.2d 720 (Md. 1989), cert. denied, 493 U.S. 1093 (1990), the Maryland Court of Appeals found that Baltimore ordinances requiring city pension funds to divest their holdings from companies engaged in business in South Africa were not unconstitutional under Zschernig. The court thought Zschernig "circumscribes, but apparently does not eliminate, a state's ability under certain circumstances to take actions involving substantive judgments about foreign nations." Id. at 746. Massachusetts relies heavily on the decision in Board of Trustees, attempting to distinguish between Baltimore's decisions regarding how to invest the city's funds and the laws struck down in New York Times Co. and Springfield Rare Coin Galleries, Inc., which were designed to regulate private conduct. The district court correctly distinguished Board of Trustees as involving quite different facts, see National Foreign Trade Council, 26 F. Supp. 2d at 291-92, and the NFTC urges this court to do the same. Board of Trustees, whether rightly or wrongly decided, does not alter our decision that the Massachusetts Burma Law, by targeting a foreign country, monitoring investment in that country, and attempting to

limit private interactions with that country, goes far beyond the limits of permissible regulation under Zschernig.[11]

Courts have also split on whether state buy-American statutes are unconstitutional under Zschernig. In Bethlehem Steel Corp. v. Board of Commissioners, 80 Cal. Rptr. 800 (Ct. App. 2d Dist. 1969), the court invalidated the California Buy American Act as "an unconstitutional encroachment upon the federal government's exclusive power over foreign affairs," id. at 802, and noted that the fact that "there are countervailing state policies which are served by the retention of such an Act is 'wholly irrelevant,'" id. at 803 (quoting Pink, 315 U.S. at 233). In contrast, in Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990), cert. denied, 501 U.S. 1212 (1991), and K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission, 381 A.2d 774 (N.J. 1977), courts upheld buy-American statutes at least in part because such statutes did not require state governments to evaluate the policies of foreign nations, and because the laws treated all foreign states in the same fashion. See Trojan Techs., 916 F.2d at 913-914; K.S.B. Technical Sales Corp., 381 A.2d at 782-84. Thus, in Trojan Technologies, the Third Circuit upheld a Pennsylvania buy-American statute because the law "provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes" and because there was no "indication from the record that the statute [had] been selectively applied according to the foreign policy attitudes of Commonwealth courts or the Commonwealth's Attorney General." Trojan Techs., 916 F.2d at 913.

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11 Massachusetts may well have tried to insulate itself from attack under Zschernig by creating a mechanism that scrutinizes companies doing business in Burma rather than the Burmese government itself, but such scrutiny is similarly intrusive.

As the district court correctly noted, see National Foreign Trade Council, 26 F. Supp. 2d at 292, K.S.B. Technical Sales Corp. and Trojan Technologies both involved laws that did not single out or evaluate any particular foreign state, and did not involve state evaluations of political conditions abroad. In contrast, the Massachusetts Burma Law is aimed at a specific foreign state and has more than incidental effects.

4. Subsequent Supreme Court Decisions and Zschernig

Massachusetts's second line of attack against the district court's ruling is that Supreme Court decisions subsequent to Zschernig, in particular the Barclays decision, demonstrate that Zschernig is so limited as not to invalidate the statute. Massachusetts relies on both the language of Barclays and on the views of some academic commentators to argue that Zschernig is or should be treated as a highly limited holding.

a. Subsequent Supreme Court References to Zschernig

Zschernig remains "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power" of the federal government. International Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053, 1069 (9th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3671 (U.S. Apr. 23, 1999) (No. 98-1706). Subsequent Supreme Court decisions have done little to clarify the reach of the Court's holding in Zschernig. Most often the Court has cited the case for the proposition that the federal government's powers over foreign affairs are plenary, or for the proposition that cases in United States courts that involve foreign sovereigns raise sensitive issues of foreign affairs. See, e.g., Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 719 (1985); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations

of the United States, and the primacy of federal concerns is evident."); see also Dennis v. Higgins, 498 U.S. 439, 463 (1991) (Kennedy, J., dissenting). In First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), involving the application of the act of state doctrine, the plurality distinguished Zschernig by noting that in Zschernig "the Court struck down an Oregon statute that was held to be 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.'" Id. at 765 (plurality opinion of Rehnquist, J.) (quoting Zschernig, 389 U.S. at 432). No decision by the Court citing Zschernig suggests that it is not binding.

b. The Effect of Barclays

Massachusetts argues that this court should nonetheless look to Barclays. Barclays, however, did not consider the reach of the foreign affairs power and did not cite Zschernig. See Barclays, 512 U.S. at 301-31.

In Barclays, the Court upheld California's corporate tax system against Commerce Clause and due process challenges to its worldwide combined reporting requirement. Petitioner Barclays had argued that the system burdened foreign-based multinationals; Barclays had also argued that the law impeded the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments." Id. at 302-03 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979)) (internal quotation marks omitted).

The Barclays Court reaffirmed that, in addition to the ordinary domestic commerce clause analysis set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), state regulation of foreign commerce raises two additional concerns: first, an "enhanced risk of multiple taxation," Barclays, 512 U.S. at 311 (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S.

159, 185 (1983)) (internal quotation marks omitted), and second, the risk of harm to the "Federal Government's capacity to speak with one voice when regulating commercial relations with foreign governments," id. (quoting Japan Line, 441 U.S. at 449) (internal quotation marks omitted). In the absence of a congressional or presidential assertion that the challenged California law violated federal policy, however, the Court could not "conclude that 'the foreign policy of the United States -- whose nuances . . . are much more the province of the Executive Branch and Congress than of this Court -- is [so] seriously threatened' by California's practice as to warrant our intervention." Barclays, 512 U.S. at 327 (alteration in original) (citation omitted) (quoting Container Corp., 463 U.S. at 196).

Barclays also reaffirmed that recognition of the importance of the federal government's ability to speak with one voice on foreign affairs does not mean that Congress must act, or that the states can never act, in a particular area. See id. at 329. As the Court commented in Wardair Canada Inc. v. Florida Department of Revenue, 477 U.S. 1 (1986), where it similarly found that a state tax law did not impede the ability of the federal government to speak with one voice,

> [b]y negative implication . . . the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel. . . . [T]he Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority.
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> . . . [W]e never suggested in [Japan Line] or in any other [case] that the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.

Id. at 12-13 (emphasis in original).

Massachusetts contends that Barclays means that only Congress, not the courts, should ever determine whether a state law interferes with the foreign affairs power of the federal government.[12] This argument echoes academic debate over whether Barclays undercuts Zschernig or not.[13]

Scholarly debate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion. We need not delve into the merits of

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12 Massachusetts also contends that Barclays demonstrates that Congress has, via inaction, explicitly permitted the Massachusetts Burma Law. We return to this argument below.

13 One commentator, for example, contends that Barclays stands for the proposition that courts should not weigh the effects of a state law on foreign relations, that Barclays undercuts claims that Massachusetts is interfering with the federal government's ability to speak with one voice, and that Barclays indicates that the Court will presume congressional tolerance of laws that touch on foreign affairs issues, in particular if foreign governments object to the state law in question. See Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617, 1700-01 (1997).

Professor Koh contests Professor Goldsmith's interpretation, arguing that it would be a mistake to read too much into the Court's statements in Barclays. Koh notes that the Solicitor General backed California's argument that there was no conflict between the state's tax laws and federal policy. "Thus, the case reveals less about the Supreme Court's view of federalism than about the Court's traditional judicial deference to the executive branch in foreign affairs." Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1848 (1998).

the academic debate[14] over Barclays in order to

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14 Other academic commentary has also questioned Zschernig. We describe the commentary but also note that an alternative view is also quite rational: that in an increasingly interdependent and multilateral world, Zschernig's affirmation of the foreign affairs power of the national government may be all the more significant.

Professor Henkin notes that Zschernig marked a significant break from prior Supreme Court jurisprudence. When the Supreme Court imposed limits on state regulation or taxation of foreign commerce prior to Zschernig, such limits "were found to be implied in the Commerce Clause." Henkin, supra, at 162. Zschernig, in contrast, used the dormant foreign affairs power of the federal government. Thus, prior to Zschernig, "[t]he Court never asked whether such state actions might run afoul also of some larger principle limiting the states in matters that relate to foreign affairs." Id. Hence Zschernig "was new constitutional doctrine," because "there was no relevant exercise of federal power and no basis for deriving any prohibition for the states by 'interpretation' of the silence of Congress and the President. The Court told us that the Constitution itself excludes such state intrusions even when the federal branches have not acted." Id. at 163-64 (footnote omitted).

Professor Goldsmith makes a related argument in commenting on Zschernig and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In Sabbatino, the Court found that the act of state doctrine precluded a challenge to an expropriation decree of the Cuban government. See id. at 428. Goldsmith contends that both Sabbatino and Zschernig marked significant breaks in the Supreme Court's development of the common law of foreign relations. Although the Court had

resolve this case. We do not view Barclays as having the impact in the foreign affairs power analysis that Massachusetts contends it has, for at least two reasons. First, Barclays did not involve a state law that targeted any foreign nation or nations, and there was no claim in the case that California was engaging in foreign policy via its tax system; the case involved claims only that the California law violated the Commerce and Due Process clauses. See Barclays, 512 U.S. at 302-03. The Court's discussion of congressional inaction came only in the context of an examination of the "speak with one voice" prong of the Foreign Commerce Clause analysis, a prong that the court reached only after concluding that the law was not otherwise unconstitutional. See id. at 320-30. In contrast, the present case involves a law impacting one foreign nation, and a claim that the Massachusetts law violates the foreign affairs power of the federal government. Second, the Supreme Court did not cite to Zschernig in Barclays, thus keeping separate the analyses that apply when examining laws under the Foreign Commerce Clause and under the foreign affairs power.[15] This is particularly so given that the parties in Barclays cited Zschernig to the Court in their briefs and at oral argument. In sum, there is simply no indication, in Barclays or in any other post-Zschernig case, that Zschernig is not good law and is not binding on us. As this court explained in Figueroa v.

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repeatedly found federal exclusivity in foreign relations prior to Sabbatino, it had generally done so "by virtue of either (a) the political branches' occupation of the field through treaty and statute, or (b) independent constitutional prohibitions." Goldsmith, supra, at 1649-50. Enforcement of federal exclusivity in foreign relations via "a judicially enforced dormant preemption" was a new development. See id. at 1649.

15 We consider below the impact of Barclays on the NFTC's Commerce Clause and Supremacy Clause challenges.

Rivera, 147 F.3d 77 (1st Cir. 1998), the Supreme Court "has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.'" Id. at 81 n.3 (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).

5. Additional Arguments Regarding the Foreign Affairs Power

a. There is No Market Participant Exception to the Foreign Affairs Power

Massachusetts suggests that, even if its interpretation of Barclays and Zschernig is incorrect, the Massachusetts Burma Law can be upheld by applying a market participant exception. This is a novel argument. Massachusetts contends that the market participant exception to the dormant domestic Commerce Clause should be extended both to the Foreign Commerce Clause -- an extension that the Supreme Court has never made -- and from there to the foreign affairs power. Even assuming that Massachusetts is acting as a market participant (and not exercising its police or regulatory powers) and that the market participant exception applies to the Foreign Commerce Clause, we find no support for Massachusetts's contention that the exception should shield its law from challenges brought under the federal foreign affairs power as interpreted in Zschernig.

Massachusetts provides little support for its argument, citing no case which has ever accepted it.[16] Massachusetts contends that

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16 Massachusetts claims that the court in Trojan Technologies, Inc. v. Pennsylvania, 742 F. Supp. 900 (M.D. Pa. 1990), aff'd, 916 F.2d 903 (3d Cir. 1990), applied a market participant exception to the foreign affairs power. See id. at

in The Federalist the Framers were concerned with state regulatory action that infringed on foreign affairs, not state proprietary action. The same rationales that support the market participant exception in dormant domestic Commerce Clause jurisprudence, Massachusetts insists, support extension of the exception to claims under the foreign affairs power.

Massachusetts also relies on a 1986 Department of Justice advisory opinion concerning the constitutionality of state and local statutes regarding divestment from South Africa. See 10 Op. Off. Legal Counsel 49 (1986). The opinion argues that "[t]he historical rationale for the general federal power over foreign

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903. There, the district court applied a market participant exception to the Foreign Commerce Clause. See id. at 902-03. In discussing the foreign affairs power, the court found that "the only impact of the Act on other countries is incidental -- i.e., a possible decrease in the total sales of foreign steel in Pennsylvania because public agencies will not buy it." Id. at 903. The court traced "[t]his result . . . to participation in the market place and not to any effort to control or regulate commerce with foreign countries." Id.

The Trojan Technologies opinion does not clarify which of three factors -- incidental impact, participation in the marketplace, or lack of effort to control commerce with foreign countries -- persuaded the district court to uphold the Pennsylvania law. In affirming, the Third Circuit avoided the subject entirely, grounding its discussion of the foreign affairs power on examination of, and interference with, the internal workings of foreign nations. See Trojan Techs., 916 F.2d at 913-14. At best, the district court decision in Trojan Technologies provides Massachusetts with a highly ambiguous holding that was not revisited on appellate review. To the extent that this case supports a market participant exception to the foreign affairs power, however, we disagree.

affairs does not imply the displacement of state proprietary power," and that "[b]ecause states . . . possessed proprietary powers at the time of the Constitution, these powers should not be displaced unless they are prohibited by a specific limitation imposed by the Constitution or federal legislation passed pursuant to a constitutional grant of power to the federal government." Id. at 63-64. This view directly contradicts the Supreme Court's repeated statements that the federal government's foreign affairs power is not limited. Zschernig makes clear that, by necessary implication, the federal government's foreign affairs power exceeds the power expressly granted in the text of the Constitution, and that state action, even in traditional areas of state concern, must yield to the federal power when such state action has more than an indirect effect on the nation's own foreign policy. Nothing in Zschernig or in the Supreme Court's market participant caselaw supports Massachusetts's argument. The Supreme Court has already rejected one attempt to extend the market participation doctrine to constitutional provisions other than the domestic Commerce Clause. See United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 219-20 (1984) (stating that the "distinction between market participant and market regulator relied upon in [domestic Commerce Clause caselaw] to dispose of the Commerce Clause challenge is not dispositive" of a claim brought under the Privileges and Immunities Clause, because "[t]he two Clauses have different aims and set different standards for state conduct").

b. The Tenth Amendment Does Not Insulate the Massachusetts Burma Law from Constitutional Scrutiny

Massachusetts also suggests in passing that its law should be protected by the Tenth Amendment, or that the Tenth Amendment, at the least, indicates that strong state interests are

at stake here. To the extent that Massachusetts intended to assert a direct Tenth Amendment claim, that claim is waived.[17] It would not suffice in any event. Massachusetts suggests that the Tenth Amendment prevents the courts and Congress from imposing regulatory burdens on the states that are not borne by private persons, and that states cannot be compelled to administer a federal regulatory program. Cf. Printz v. United States, 117 S. Ct. 2365, 2384 (1997); New York v. United States, 505 U.S. 144, 178-80 (1992). Massachusetts argues that the effect of the district court decision is to compel Massachusetts to engage in commerce with members of the NFTC. These arguments miss their mark: even if Massachusetts were being compelled to deal with firms that do business in Burma, such compulsion is not similar to the federal government compulsion of states found impermissible in New York and Printz.

Massachusetts also contends that a state's purchasing decisions "lie[] at the core of state sovereignty" and thus fall

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17 Massachusetts has waived its argument under Printz and New York v. United States, 505 U.S. 144 (1992). Massachusetts raises this argument only in a brief footnote. We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived. See, e.g., Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 36 (1st Cir. 1994) (argument raised by way of "cursory footnote" deemed waived); Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 1000 n.9 (1st Cir. 1992) ("As appellant presents its contention in a cursory and conclusory footnote reference it merits no independent discussion." (citations omitted)); Barrett v. United States, 965 F.2d 1184, 1194 n.19 (1st Cir. 1992) ("Since petitioner merely adverts to the claim in a perfunctory fashion in a footnote, and without developed argumentation, the claim is deemed waived." (internal quotation marks omitted)).

within the area protected by the Tenth Amendment, and that the Massachusetts law is an "expression of a moral position on an important issue of public policy." We do not view these arguments as distinct from Massachusetts's claim that the law reflects important state interests that, under Zschernig, must be balanced against the federal government's foreign affairs power. Even where they exist, strong state interests do not make an otherwise unconstitutional law constitutional.

c. The Massachusetts Burma Law is Not Shielded by the First Amendment

Massachusetts also argues that, regardless of the effect of Zschernig on the Massachusetts Burma Law, the law is protected by the First Amendment. At oral argument, Massachusetts stated that it is not actually contending that the First Amendment protects its law or that the Commonwealth has First Amendment rights. Instead, Massachusetts argues that First Amendment values should weigh in favor of a finding that Massachusetts has significant interests at stake here, interests that should be considered under Zschernig. Although a few district courts in other circuits have found that local governments do have First Amendment rights, see, e.g., County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990), the First Circuit has expressed doubt, holding that a legal services office of a state university lacks such rights and saying that "a state entity[] itself has no First Amendment rights," Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 481 (1st Cir. 1989). Nothing in Zschernig suggests that a state government's First Amendment interests, if any, should weigh into a consideration of whether a

state has impermissibly interfered with the federal government's foreign affairs power.[18]

III

The foreign affairs power is, of course, not the only aspect of the Constitution at work in the foreign affairs arena. In addition to the foreign affairs power, the Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. "It has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted . . . .'" Barclays, 512 U.S. at 310 (alterations in original) (quoting Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769 (1945)). The NFTC argues that, regardless of whether the Massachusetts Burma Law violates the foreign affairs power, the law violates the dormant Commerce Clause. Massachusetts responds that it is a market participant, and that the market participant exception that the Supreme Court has recognized in its dormant domestic Commerce Clause analysis should be applied to the Foreign Commerce Clause. Even if the exception does not apply, Massachusetts further contends, the law still does not violate the Foreign Commerce Clause. The district court did not reach these arguments. See National Foreign Trade Council, 26 F. Supp. 2d at 293.

We examine these claims in three stages. First, applying dormant domestic Commerce Clause caselaw, we find that Massachusetts is not a market participant when it acts pursuant to the Massachusetts Burma Law. Second, we examine whether, in

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18 We do not consider here whether Massachusetts would be authorized to pass a resolution condemning Burma's human rights record but taking no other action with regard to Burma.

any event, the market participant exception should be extended to the Foreign Commerce Clause. Third, we find that the Massachusetts law violates the Foreign Commerce Clause.

1. Massachusetts is Not Acting as a Market Participant

Massachusetts says that it is exempt from any Foreign Commerce Clause scrutiny because it is a market participant and not a market regulator. Massachusetts relies on the Supreme Court's domestic Commerce Clause decisions in White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983), Reeves, Inc. v. Stake, 447 U.S. 429 (1980), and Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). These cases establish that "if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984) (plurality opinion of White, J.); see also White, 460 U.S. at 214-15; Reeves, 447 U.S. at 436-37; Alexandria Scrap, 426 U.S. at 810. We will assume arguendo that there is a market participant exception under the Foreign Commerce Clause and test whether Massachusetts is acting as a market participant or as a market regulator.

Even applying domestic market participant doctrine in this context, we hold that Massachusetts has not acted as a mere market participant. The Supreme Court first recognized the domestic market participant exception in Alexandria Scrap, upholding a Maryland law that imposed extra documentation requirements on out-of-state processors of scrap metal who sought to receive bounties from the state for converting junk cars into scrap. See Alexandria Scrap, 426 U.S. at 800-01, 814. In Reeves, the Court upheld South Dakota's decision to sell cement from a state-owned plant only to state residents during a cement

shortage. See Reeves, 447 U.S. at 432-34, 446-47. The cases bearing most directly on the issue here are the Supreme Court's subsequent decisions in White, South-Central Timber, and Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

In White, the Supreme Court upheld against a domestic Commerce Clause challenge a mayoral order that required at least half of the workforce to be Boston residents on projects funded partially or entirely by Boston city funds. The Court commented that there was no evidence that the executive order in question was an "'attempt to force virtually all businesses that benefit in some way from the economic ripple effect' of the city's decision to enter into contracts for construction projects 'to bias their employment practices in favor of the [city's] residents.'" White, 460 U.S. at 211 (alteration in original) (quoting Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)).

In South-Central Timber, the Supreme Court held that the domestic market participant doctrine has limits. The Court held that the state of Alaska, as a seller of timber, could not require that timber from state lands be processed within the state before being exported, and said that the market participant doctrine does not permit a state to impose extensive conditions on firms with which the state does business: "Although the Court in Reeves did strongly endorse the right of a State to deal with whomever it chooses when it participates in the market, it did not -- and did not purport to -- sanction the imposition of any terms that the State might desire." South-Central Timber, 467 U.S. at 95-96 (plurality opinion of White, J.). The plurality added that the "doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." Id. at 97. The plurality noted that Alaska was not just participating in the

market, for "the seller usually has no say over, and no interest in, how the product is to be used after sale," id. at 96, and that "[u]nless the 'market' [in the market participation doctrine] is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry," id. at 97-98. "In sum, the State may not avail itself of the market-participant doctrine to immunize its downstream regulation of [a] market in which it is not a participant." Id. at 99.

More recently, in Camps Newfound/Owatonna, the Court again rejected an attempt to use the market participant exception to shield state conduct from domestic Commerce Clause scrutiny. The Court said that the market participant exception is a narrow one, noting that Reeves and Alexandria Scrap both involved "a discrete activity focused on a single industry." Camps Newfound/Owatonna, Inc., 520 U.S. at 594. The Court invalidated a Maine statute that granted more limited tax benefits to non-profit organizations largely serving non-residents than to organizations primarily serving Maine residents. See id. at 567-69, 594-95. The Court warned against an expansion of the market participant exception that "would swallow the rule against discriminatory tax schemes." Id. at 594. Maine's tax exemption, it said, "must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function." Id.

We find that in enacting the Massachusetts Burma Law the Commonwealth has crossed over the line from market participant to market regulator. Massachusetts contends that its law is akin to the Boston order upheld in White. But White involved an attempt to dictate the employment of Boston residents in projects funded by the city; it did not involve an attempt by Boston to require all contractors with the city to employ Boston residents in

all of their other projects, a situation more akin to this case. Here, Massachusetts is attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts.

Massachusetts attempts to distinguish its law from the controlling Supreme Court precedent. Massachusetts notes that South-Central Timber involved an attempt to impose a downstream restriction on timber. Indeed, the Alaska regulation there at issue imposed a "restriction on private economic activity [that took] place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the [state actor] retained a continuing proprietary interest in the subject of the contract." South-Central Timber, 467 U.S. at 99 (plurality opinion of White, J.). In contrast, Massachusetts contends, its law does not attempt to impose limits after the completion of a contract. Massachusetts is technically correct that firms are free to engage in business with Burma once their contracts with Massachusetts are completed. But this distinction is hollow: the Massachusetts law, by creating a selective purchasing list, creates a mechanism to monitor the ongoing activities of private actors. This monitoring is not limited to individual purchasing decisions. Further, Massachusetts is attempting to regulate unrelated activities of its contractors once a contract is signed but before its performance is completed. Massachusetts also attempts to regulate unrelated activities of anyone negotiating with the state or responding to a request for bids. Importantly, the Massachusetts Burma Law applies to conduct not even remotely linked to Massachusetts. It imposes restrictions on markets other than the market for state procurement contracts. Under South-Central Timber, states may not use the market participant exception to shield otherwise impermissible regulatory behavior that goes beyond ordinary private market conduct.

Massachusetts also argues that the effects of its law are not relevant to the inquiry into whether it is acting as a regulator. Massachusetts notes that the Supreme Court has found that states were acting as market participants even when they pursued goals not directly linked to local economic well-being. Massachusetts is correct that in Alexandria Scrap the Supreme Court permitted Maryland to act as a market participant to pursue environmental concerns. See Alexandria Scrap, 426 U.S. at 809, 814; see also L. Tribe, Constitutional Choices 144 (1985) (noting that Alexandria Scrap and Reeves involved situations in which states "intended their entrances [into the market] to affect the flow of commerce so as to enhance public values" (emphasis in original)). Yet this is not enough to save a law that regulates activity outside of Massachusetts that is not related to the seller's interactions with Massachusetts. As the Supreme Court has explained, Alexandria Scrap, Reeves, and White stand for the proposition that "under the dormant Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.'" Camps Newfound/Owatonna, 520 U.S. at 592-93 (quoting Alexandria Scrap, 426 U.S. at 810).[19] But this doctrine does not permit Massachusetts to pursue goals that are not designed to favor its citizens or to secure local benefits. Cf. Air Transport Ass'n of

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19 Massachusetts contends that Camps Newfound/Owatonna actually supports Massachusetts's position. The Court in Camps Newfound/Owatonna distinguished between the Maine tax law at issue and laws that involve direct state purchases of goods. See Camps Newfound/Owatonna, 520 U.S. at 594. This reference, however, does not support the contention that all state purchasing decisions are protected by the market participant exception.

Am. v. City and County of San Francisco, 992 F. Supp. 1149, 1163 (N.D. Cal. 1998).

Massachusetts's action is also invalid under Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc., 475 U.S. 282 (1986), in which the Supreme Court held that Wisconsin was not acting as a market participant when it refused to purchase products from repeated violators of the National Labor Relations Act. See id. at 289. The Court found that "Wisconsin's debarment scheme is tantamount to regulation," id., as the law could not "even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or [as] a law that pursues a task Congress intended to leave to the States," id. at 291. In Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993), the Court stated that "Gould makes clear" that "[w]hen the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role." Id. at 229.

Attempting to distinguish Gould, Massachusetts argues that Gould was concerned primarily with the NLRA's preemption of state law and that Gould involved punishment of companies for past actions. Massachusetts protests that under the Massachusetts Burma Law the Commonwealth is imposing conditions on current activities -- and thus companies can respond by changing their practices. Cf. Board of Trustees, 562 A.2d at 751 (distinguishing Gould). Under Gould and South-Central Timber, however, state regulations that go beyond the scope of normal market participation are not immune from Commerce Clause scrutiny. Massachusetts's desire to eliminate moral taint that it claims it suffers from dealing with firms that do business in Burma does not permit it to act to regulate activities beyond its borders.

Massachusetts contends that it acts as private actors do because some companies have ceased doing business with Burma due to human rights concerns. The NFTC, in turn, argues that these companies have not ceased doing business with other companies that remain involved in Burma. Even if certain companies ceased purchasing goods from companies that maintain investments in Burma, such a fact would not be sufficient to lead us to consider the Massachusetts Burma Law to be market participation. The proper inquiry is whether Massachusetts is acting as an ordinary market participant would act, not whether any participant has acted in such a fashion. Massachusetts has created a market, but it cannot regulate the market that it has created so as to regulate conduct elsewhere not related to that market. As the NFTC noted at oral argument, Massachusetts's action here is akin to prohibiting purchases from companies that do business in states that have policies with which Massachusetts disagrees. This would plainly be unconstitutional under the domestic Commerce Clause. Massachusetts surely cannot do the same in the international context, as state actions that affect international commerce receive even greater scrutiny than do actions that affect interstate commerce. See Japan Line, 441 U.S. at 448.

2. It is Unlikely that the Market Participant Exception Applies to the Foreign Commerce Clause

Our finding that Massachusetts is not acting as a market participant means that the Massachusetts law must be subjected to ordinary Foreign Commerce Clause analysis. Yet there is likely an additional reason that the Massachusetts law is not shielded from Foreign Commerce Clause scrutiny: we are skeptical of whether the market participation exception applies at all (or without a much higher level of scrutiny) to the Foreign Commerce Clause.

The Supreme Court has not resolved this issue. In Reeves, the Court commented that "[w]e have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause" but added that such "scrutiny may well be more rigorous when a restraint on foreign commerce is alleged." Reeves, 447 U.S. at 437 n.9; see also South-Central Timber, 467 U.S. at 92 n.7 (expressing concern about the international ramifications of Alaska's challenged timber policy).

Massachusetts's argument relies on the decisions in Trojan Technologies, Inc., 916 F.2d at 912, Board of Trustees, 562 A.2d at 752-53, and K.S.B. Technical Sales Corp., 381 A.2d at 788. Cf. Tribe, American Constitutional Law § 6-21, at 469 (2d ed. 1988) (noting that while state laws banning private individuals or companies from doing business with South Africa would be invalid under Zschernig, "under the Supreme Court's market participant exception to the commerce clause, a state would be free to pass . . . rules requiring that purchases of goods and services by and for the state government be made only from companies that have divested themselves of South African commercial involvement" (footnote omitted)). Massachusetts urges us to follow Trojan Technologies, Board of Trustees, and K.S.B. Technical Sales Corp. We decline to do so.

The Supreme Court has repeatedly suggested that state regulations that touch on foreign commerce receive a greater degree of scrutiny than do regulations that affect only domestic commerce. See South-Central Timber, 467 U.S. at 96; Reeves, 447 U.S. at 437 n.9; Japan Line, 441 U.S. at 448 (noting that "there is evidence that the Founders intended the scope of the foreign commerce power to be . . . greater" than that of the domestic commerce power). Contrary to the Third Circuit's view in Trojan Technologies, we believe that the risks inherent in state regulation of foreign commerce -- including the risk of retaliation against the nation as a whole and the weakening of the federal

government's ability to speak with one voice in foreign affairs, see Japan Line, 441 U.S. at 450-51 -- weigh against extending the market participation exception to the Foreign Commerce Clause. When it comes to state actions that touch on foreign affairs, "[a] foreign government has little inclination to discern whether a burdensome action taken by a political subdivision of the United States was taken under a proprietary or a regulatory guise," and "the potential for the creation of friction between the United States and a foreign nation is not lessened because the state acts as a proprietor instead of a regulator." K. Lewis, Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation, 61 Tul. L. Rev. 469, 485 (1987). To extend the market participant doctrine would be to ignore these additional risks that arise in the foreign commerce context. But the issues are complex and we choose to leave their resolution to another day and another case.

3. The Massachusetts Burma Law Violates the Foreign Commerce Clause

Because the market participation exception does not shield the Massachusetts Burma Law from Commerce Clause scrutiny, we must turn to whether the law does indeed violate the Foreign Commerce Clause. "Absent a compelling justification . . . a State may not advance its legitimate goals by means that facially discriminate against foreign commerce." Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 81 (1992). Like the dormant domestic Commerce Clause, which has the "core purpose . . . [of] prevent[ing] states and their political subdivisions from promulgating protectionist policies," Houlton Citizens' Coalition v. Town of Houlton, No. 98-1999, 1999 WL 228274, at *10 (1st Cir. Apr. 22, 1999), the Foreign Commerce Clause restricts protectionist policies, but it also restrains the states from excessive interference in foreign affairs.

The crucial inquiry in this case is whether the Massachusetts Burma Law is facially discriminatory. The NFTC does not claim that the law is invalid as applied under the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Massachusetts puts forth two arguments to support its claim that its law does not violate the Foreign Commerce Clause. First, Massachusetts contends that the law does not discriminate between domestic and foreign companies. Second, Massachusetts argues that its law does not impair the federal government's ability to speak with one voice regarding foreign commerce. Under standard Commerce Clause analysis, a statute that facially discriminates against interstate or foreign commerce will, in most cases, be found unconstitutional. See, e.g., Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994) ("If a restriction on commerce is discriminatory, it is virtually per se invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" (quoting Pike, 397 U.S. at 142) (emphasis in original) (citation omitted)). Even under that analysis, we find that the law is discriminatory and violates the Foreign Commerce Clause. Although the law does not discriminate against foreign companies, it does discriminate against foreign commerce. Also, the law impedes the federal government's ability to speak with one voice in foreign affairs, and amounts to an attempt to regulate conduct outside of Massachusetts and outside of this country's borders. For these three reasons, we hold that the Massachusetts law violates the Foreign Commerce Clause.

a. The Massachusetts Burma Law Facially Discriminates Against Foreign Commerce

Massachusetts first argues that its law does not actually discriminate against foreign commerce, primarily because the law does not distinguish between foreign and domestic companies. Massachusetts relies on Oregon Waste Systems and Kraft. In Oregon Waste Systems, the Supreme Court said that the domestic Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., 511 U.S. at 98. In Kraft, the Supreme Court invalidated as facially discriminatory a state tax scheme that treated dividends from foreign subsidiaries less favorably than dividends from domestic subsidiaries. See Kraft, 505 U.S. at 74-77, 82. Massachusetts contends that these cases support its argument that a law must distinguish between foreign and domestic producers in order to be held facially invalid. That is not the test. Massachusetts also argues that the crucial factor in determining whether a law discriminates is not whether the law singles out a particular foreign state, but rather whether it discriminates "in favor of in-state businesses." Board of Trustees, 562 A.2d at 754 n.56. That is also not the test.

A law need not be designed to further local economic interests in order to run afoul of the Commerce Clause. The Supreme Court has said, "[o]ur cases . . . indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." New Energy Co. v. Limbach, 486 U.S. 269, 276 (1988). In Kraft, the Supreme Court explicitly rejected the argument that local favoritism is crucial to a finding that a law is facially discriminatory, stating that it was "not persuaded . . . that such favoritism is an essential element of a violation of the Foreign Commerce Clause. . . . As the absence

of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions." Kraft, 505 U.S. at 79.

Nor does the law's applicability to both foreign and domestic companies save it. Supreme Court decisions under the Foreign Commerce Clause have made it clear that state laws that are designed to limit trade with a specific foreign nation are precisely one type of law that the Foreign Commerce Clause is designed to prevent. In Container Corp., the Supreme Court stated that state legislation that relates to foreign policy questions violates the Foreign Commerce Clause "if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." Container Corp., 463 U.S. at 194 (emphasis in original); see also Japan Line, 441 U.S. at 448-49 (stating that "[f]oreign commerce is preeminently a matter of national concern" and noting that "[t]he need for federal uniformity is no less paramount in ascertaining the negative implication of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause"). "If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." Tribe, American Constitutional Law § 6-21, at 469. Although the Court in Container Corp. stated that a state law would not be held invalid if it had only "foreign resonances," Container Corp., 463 U.S. at 194, Massachusetts's law clearly has more than just foreign resonances. Indeed, a chief goal of the Massachusetts law is to affect business decisions pertaining to a foreign nation.

The Massachusetts Burma Law discriminates against two subsets of foreign commerce -- that involving companies or persons organized or operating in Burma and that involving companies or persons doing business with Burma. The law is thus a direct attempt to regulate the flow of foreign commerce.

Massachusetts's arguments miss a crucial point. When the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the conduct of foreign companies; it is also referring to attempts to restrict the actions of American companies overseas. Long-standing Supreme Court precedent indicates that the Framers were concerned with "discriminations favorable or adverse to commerce with particular foreign nations [under] state laws." Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 317 (1851).

b. The Massachusetts Burma Law Interferes with the Ability of the Federal Government to Speak with One Voice

The NFTC's argument that the Massachusetts Burma Law violates the Commerce Clause because it interferes with the federal government's ability to speak with one voice is similar to, but distinct from, the argument that the law violates the foreign affairs power of the federal government. Independent of any claim under Zschernig, the Supreme Court decisions in Japan Line and Container Corp. make clear that a state law can violate the dormant Foreign Commerce Clause by impeding the federal government's ability to "speak with one voice" in foreign affairs, because such state action harms "federal uniformity in an area where federal uniformity is essential." Japan Line, 441 U.S. at 448-49; see also Container Corp., 463 U.S. at 193.

Massachusetts contends that Barclays "severely undercuts, if not eliminates" the Commerce Clause "one voice" test. Massachusetts also argues that Barclays demonstrates that the one voice test has never actually forbidden voices other than that of the federal government, and that while the federal government has the last word on foreign affairs -- and thus can preempt the Massachusetts law -- it does not have the only word.

Massachusetts misreads Barclays. Rather than dismantling the one voice test, Barclays applied this test. The Court found, however, that since Congress had effectively condoned the challenged law, the Court could not conclude that the California worldwide reporting requirement impeded the ability of the federal government to speak with one voice. See Barclays, 512 U.S. at 328-30. Barclays reached this determination in light of repeated congressional consideration of the precise issue at hand and in light of the fact that the challenged law did not directly regulate foreign commerce.[20] Nothing in Barclays suggests that we should reduce the amount of scrutiny that a state law that directly regulates foreign commerce should receive.

c. Massachusetts is Attempting to Regulate Conduct Beyond Its Borders

The Massachusetts Burma Law violates the Foreign Commerce Clause for an additional reason: Massachusetts is attempting to regulate conduct beyond its borders and beyond the borders of this country. In the domestic Commerce Clause arena, the Supreme Court has held that "one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce but is also constrained by the need to respect the interests of other States," and that "it follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571-72 (1996) (citation omitted). In Brown-Forman Distillers Corp. v.

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20 We further discuss the significant factual, procedural, and substantive differences between Barclays and this case below in our discussion of Massachusetts's claim that Congress has implicitly permitted the Massachusetts Burma Law.

New York State Liquor Authority, 476 U.S. 573 (1986), the Court invalidated a New York law that required that wholesale prices of alcohol in New York not exceed the lowest price at which the seller would sell the same product in any other state. See id. at 575-78. The Court held that the fact that the law was "addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." Id. at 583 (quoting Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 775 (1945)). The Massachusetts statute does not meet even these standards because both the intention and effect of the statute is to change conduct beyond Massachusetts's borders.

Massachusetts is in no better position because it seeks in part to change conduct not only outside Massachusetts, but also outside the United States. Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 333-34 (1964) (equating state attempts to control commerce flowing into foreign countries with attempts to control commerce flowing into a federal enclave). Massachusetts may not regulate conduct wholly beyond its borders. Yet the Massachusetts Burma Law -- by conditioning state procurement decisions on conduct that occurs in Burma -- does just that. Cf. Healy v. Beer Inst., 491 U.S. 324, 336 (1989) ("The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." (alteration in original) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion)) (internal quotation marks omitted)).[21] The "critical inquiry" here is "whether the

21 Massachusetts points to Scariano v. Justices of the Supreme Court of Indiana, 38 F.3d 920 (7th Cir. 1994), to support its argument that where extraterritorial effects are not inevitable, there is no Foreign Commerce Clause violation. That case involved a challenge to Indiana's rules exempting out-

practical effect of the regulation is to control conduct beyond the boundaries of the State." Healy, 491 U.S. at 336. Because we find that the Massachusetts Burma Law has such an effect, and is not otherwise shielded by the market participant exception, we find that the law violates the Foreign Commerce Clause.

Massachusetts cannot save its law by protesting that a company doing business with Burma can simply forgo contracts with Massachusetts, or simply beat the next highest bidder's price by ten percent. Every discriminatory state law can be avoided by withdrawing from the enacting state. In Healy, for example, liquor distributors could have avoided the New York law by staying out of the New York liquor market. To allow state laws to stand on this ground, however, would be to read the Commerce Clause out of the Constitution. Moreover, the relative influence of a state's purchasing power cannot suffice to save discriminatory legislation. If a Massachusetts can enact a Burma law, so too can California or Texas. Finally, we have no reason to view a ten-percent bidding penalty as anything other than an effective exclusion from the bidding process.

d. Massachusetts Has Failed to Put Forth a Legitimate Local Justification in Support of its Law

Given that the Massachusetts Burma Law discriminates on its face against foreign commerce, it can survive Commerce Clause scrutiny only if it is "demonstrably justified" because it "advances a legitimate local purpose that cannot be adequately served by

of-state practitioners from Indiana's bar exam only if they had practiced predominately in Indiana for five years. The court found that this law had, at most, de minimis extraterritorial effects. See id. at 922, 927. That case thus has little relevance to the issues in this case.

reasonable nondiscriminatory alternatives." New Energy Co., 486 U.S. at 274, 278. Massachusetts, having made its primary arguments on other grounds, provides no support under either domestic or Foreign Commerce Clause jurisprudence for the proposition that a state's expression of moral concerns can provide a valid basis for a discriminatory law.[22] Even if expression of moral outrage about foreign human rights concerns were a valid local purpose, Massachusetts would need to show

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22 Amici curiae Center for Constitutional Rights et al. cite to Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), and Trap Rock Industries, Inc. v. Kohl, 284 A.2d 161 (N.J. 1971), to support their contention that a state's moral concerns can be a sufficient ground to justify laws such as the Massachusetts Burma Law. Yet neither case addressed a law that facially discriminated against interstate or foreign commerce. Perkins dismissed, for lack of standing, a challenge to the Secretary of Labor's determinations of wage localities under a statute requiring federal contractors to pay the prevailing local minimum wage. See Perkins, 310 U.S. at 116-17, 125-27. In Trap Rock, the New Jersey Supreme Court upheld the New Jersey Commissioner of Transportation's decision to bar firms, including a low bidder, from bidding on state contracts after the firms' principals were indicted on bribery charges. See Trap Rock, 284 A.2d at 163-64. Citing Perkins and emphasizing the state government's broad discretion in purchasing decisions, the court found that the Commissioner had acted within his statutory discretion. Id. at 164, 168, 172. Like Perkins, however, Trap Rock bears no relation to this case. It is by now well understood that a state can, through its purchasing practices, pursue a variety of objectives, as long as its actions do not violate other laws or the Constitution. See, e.g., Foto USA, Inc. v. Board of Regents of the Univ. Sys. of Florida, 141 F.3d 1032, 1036-37 (11th Cir. 1998).

that it has no less discriminatory means of expressing its outrage. It has not done so, or even attempted to do so.

The NFTC argues that the Supreme Court has made clear that the only facially discriminatory laws that survive domestic Commerce Clause scrutiny are laws designed to protect a state's natural resources or the health and safety of its citizens. Cf. Maine v. Taylor, 477 U.S. 131, 151 (1986); Oregon Waste Sys., 511 U.S. at 101. Regardless of any such limits in the Commerce Clause context, as discussed above, Massachusetts's attempt to justify this statute as falling within traditional areas of state concern is unconvincing. The Supreme Court has recognized a number of disparate topics and fields of law as traditional areas of state concern,[23] but has not suggested that moral concerns regarding human rights conditions abroad -- though effectuated via state procurement policy -- are such an area. The argument that there is a local purpose that cannot otherwise be adequately served is very weak and does not suffice.

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23 See, e.g., California Div.of Labor Standards Enfor. v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 330, 334 (1997) (prevailing-wage law); General Motors Corp. v. Tracy, 519 U.S. 278, 294 (1997) (regulation of local gas franchises); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 649-50, 655 (1995) (regulation of hospital billing); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) (real property); Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493, 510-12, 514 (1989) (natural resources); Rose v. Rose, 481 U.S. 619, 626, 628 (1987) (domestic relations); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 742-44 (1985) (insurance); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (weights and measures on product packaging).

IV

The NFTC contends that the Massachusetts Burma Law is preempted by the Federal Burma Law, and thus violates the Supremacy Clause. Massachusetts contends both that Congress has implicitly permitted the law and that, in any event, the federal sanctions do not preempt the Massachusetts law. We reject Massachusetts's claim that Congress has permitted the law and find that Congress has preempted the law.

The district court found that the NFTC "failed to carry [its] burden" of showing "that Congress intended to exercise its authority to set aside a state law." National Foreign Trade Council, 26 F. Supp. 2d at 293. The district court rejected the NFTC's claim that the Massachusetts law reflected a unilateral approach to trade with Burma, one that conflicted with federal law's endorsement of a multilateral strategy. The court based this finding on its determination that the federal statute "actually provides for unilateral sanctions against [Burma]." Id. In so doing, the district court misapprehended NFTC's burden and applied an erroneous legal standard to the facts.

1. Congress Has Not Implicitly Approved of or Permitted the Massachusetts Law

Massachusetts attempts to preclude an inquiry into whether its law is preempted by the Federal Burma Law by arguing that Congress, fully aware of the Massachusetts law when it considered federal sanctions against Burma, failed explicitly to preempt the state law and thus impliedly permitted it. Massachusetts again relies on the Supreme Court's opinion in Barclays, arguing that Congress's failure explicitly to preempt the law shields the law from constitutional scrutiny. We reject Massachusetts's argument.

As it had done in Container Corp., 463 U.S. at 196-97, and Wardair, 477 U.S. at 6-7, the Supreme Court in Barclays looked for indicia that Congress had acted to preempt the state practices in dispute. Noting that Congress was fully aware of foreign government opposition to state combined reporting requirements, see Barclays, 512 U.S. at 324, that the Court itself had ruled favorably to the state on the issue in a previous case, see id. at 321-22, and that Congress had "on many occasions studied state taxation of multinational enterprises," id. at 324-25, including consideration of proposed legislation that would have prohibited California's reporting requirements, see id. at 325, the Court stated that "Congress implicitly has permitted the States to use the worldwide combined reporting method," id. at 326 (emphasis in original); see also id. at 329 ("Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit state-mandated worldwide combined reporting."). Barclays made clear that determining "whether the national interest is best served by tax uniformity, or state autonomy," was a decision best left to Congress, not the courts. Id. at 331; see also Container Corp., 463 U.S. at 194 ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please."). The posture of Congress here is nothing like the position of Congress recounted in Barclays.

Massachusetts notes that, in addition to failing to indicate a desire to preempt in the Federal Burma Law, Congress has debated the appropriateness of state and local actions concerning Burma, but has not passed legislation explicitly preempting state and local selective purchasing laws. See 144 Cong. Rec. H7,277-H7,285 (daily ed. Aug. 5, 1998). Massachusetts's argument is supported by amici curiae members of Congress in support of reversal, who contend that "Congress is well aware of the

criticism being directed at the Massachusetts law and other state and local purchasing measures," and who point to repeated testimony regarding the issue before congressional subcommittees. These amici curiae also state that Congress's failure to address state and local measures, either when it enacted the federal sanctions against Burma or when it considered legislation reforming federal sanctions law, see H.R. 2708, 105th Cong. (1997), was intentional. Massachusetts's argument is opposed by other amici curiae who are also members of Congress, who say that the Massachusetts law threatens to destroy the carefully crafted federal scheme of sanctions against Burma, and who argue that Congress lacks the ability to monitor the legislative activities of the fifty states and thousands of municipalities in this country to determine whether laws of such jurisdictions are harming the nation's foreign policy.

We do not believe that Barclays applies to the facts of this case, for four reasons. First, the discussion of preemption in Barclays came as part of a Commerce Clause inquiry into whether the challenged law impaired the federal government's ability to speak with one voice. The California law was not challenged under the Supremacy Clause. Barclays commented that "there is no claim here that the federal tax statutes themselves provide the necessary pre-emptive force." Barclays, 512 U.S. at 321 (quoting Container Corp., 463 U.S. at 196) (internal quotation marks omitted). Barclays thus did not discuss how courts should address Supremacy Clause challenges to state laws that impact foreign affairs, such as the Massachusetts Burma Law.

Second, Barclays involved an area of traditional state activity: taxation of companies which do business within the state and elsewhere and the appropriate allocation to the state of such companies' income. The California law had few direct foreign

policy implications and was not structured so as to affect conduct beyond the borders of the state.

Third, the clarity and frequency in Barclays of the refusal of Congress to act, despite a host of bills and a Supreme Court decision, is vastly different than the situation we face in this case. In Barclays, Congress had been put on notice by the Court's prior decision in Container Corp. and had considered "numerous bills [that] . . . would have prohibited the California reporting requirement." Id. at 325. In contrast, Congress never formally voted on provisions that would have explicitly preempted the Massachusetts law. The Barclays discussion of implied permission involved only a Commerce Clause inquiry into whether state laws are preempted by the need for the nation to speak with one voice in foreign affairs. Massachusetts has given us no reason to extend Barclays to the different facts we face here, and we decline to do so.[24]

Fourth, although Barclays involved congressional silence, Congress has not been silent about Burma. The real question is not what to infer from congressional inaction, but how to interpret the action that Congress has already taken in enacting sanctions against Burma.

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[24] The fact that Barclays looked to congressional inaction only in order to inquire into whether the law impeded the federal government's ability to speak with one voice highlights the weakness in Massachusetts's additional claim that, given the Barclays presumption, this court should not even commence an inquiry into the validity of the Massachusetts law under the Commerce Clause. In Barclays, as "[i]n both Wardair and Container Corp., the Court considered the 'one voice' argument only after determining that the challenged state action was otherwise constitutional." Barclays, 512 U.S. at 323.

2. The Massachusetts Burma Law is Preempted by the Federal Burma Law.

We address the question of whether the Federal Burma Law preempts Massachusetts's law by examining the usual indicia of congressional intent where there is no express preemption statement. Congressional intent to preempt may be found where a federal statute is so pervasive as to occupy the field, see Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992), where it would be physically impossible to comply with both the federal and the state law, see Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where enforcement of the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines, 312 U.S. at 67.

If the subject matter of the law in question is an area traditionally occupied by the states, congressional intent to preempt must be "clear and manifest." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The district court, relying on a domestic commerce clause case, stated that "[p]laintiff's burden is particularly heavy." National Foreign Trade Council, 26 F. Supp. 2d at 293. This was error.

Preemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs. The test which should be applied is set forth in Hines.

In Hines, the Supreme Court found that Pennsylvania's Alien Registration Act was preempted by the federal Alien Registration Act. The Court stated that "[n]o state can add to or take from the force and effect of [a] treaty or statute [regarding aliens]." Hines, 312 U.S. at 63. The Court commented:

> [T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Id. at 66-67 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)) (footnote omitted). Likewise, in Boyle v. United Technologies Corp., 487 U.S. 500 (1988), the Court, considering the liability of an independent contractor who had supplied a military helicopter to the United States, commented that when considering "an area of uniquely federal interest," a "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.'" Id. at 507 (quoting Rice, 331 U.S. at 230).[25]

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[25] Professor Tribe makes the same point:

> [I]f the field is one that is traditionally deemed "national," the Court is more vigilant in striking down state incursions into subjects that Congress may have reserved to itself. It was not surprising, therefore, that the Court invalidated the state alien registration law in Hines v. Davidowitz; the Court was extremely solicitous of the paramount federal interest in matters germane to foreign affairs.

Hines and its progeny establish that preemption is much more easily found when Congress has passed legislation relating to foreign affairs. The Supreme Court has repeatedly cited Hines for the proposition that an "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Maryland v. Louisiana, 451 U.S. 725, 746 (1981); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973); Rice, 331 U.S. at 230. Other cases make the same point using similar language. See, e.g., Hillsborugh County, 471 U.S. at 713; Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956).

The Supreme Court, distinguishing Hines in considering a state labor law, explained:

> [In Hines] we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any "concurrent state power that may exist is restricted to the narrowest of limits." Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.

Tribe, American Constitutional Law § 6-27, at 500 (footnote omitted).

Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942) (quoting Hines, 312 U.S. at 68) (citation omitted).

Massachusetts argues that the ordinary clear statement rule regarding congressional intent to preempt should apply because state procurement is a traditional area of state power reserved to the states by the Tenth Amendment. Cf. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted)). This argument is no more convincing here than it is in the context of Massachusetts's claim that its Tenth Amendment interests shield its law from scrutiny under Zschernig. Massachusetts argues that "state procurement is not an area of unique federal interest" (internal quotation marks omitted), but ignores the fact that its law, like the federal sanctions against Burma, is aimed primarily at effecting change in and expressing disapproval of the current regime in Burma. Similarly, the fact that Congress has at times explicitly preempted local sanctions, see, e.g., 50 U.S.C. app. § 2407(c) (West 1991) (stating that federal provisions prohibiting United States persons from complying with foreign boycotts against nations with which the United States maintains friendly relations preempted state and local laws, regulations, and rules), does not prevent our finding of preemption where Congress has not spoken so directly. To do otherwise would be to ignore Hines.

Massachusetts attempts to distinguish this case from Hines by relying on DeCanas v. Bica, 424 U.S. 351 (1976). De Canas concerned a California law forbidding employers from "knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an

adverse effect on lawful resident workers." Id. at 352 (quoting Cal. Labor Code § 2805(a)) (internal quotation marks omitted). The Supreme Court found that the Immigration and Nationality Act, while a "comprehensive federal statutory scheme for regulation of immigration and naturalization," nevertheless did not preempt the California law. Id. at 353-54. To reach this conclusion, however, the Court first assumed that the California statute "only applie[d] to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations." Id. at 353 n.2. Thus, the California law simply "adopt[ed] federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country." Id. at 355.

In contrast, Massachusetts is attempting to regulate the same conduct -- trade with Burma -- addressed by the Federal Burma Law, but is doing so by imposing distinct restrictions different in scope and kind from the federal law. Some actions lawful under federal law would be unlawful under the state statute. The Massachusetts law is therefore akin to a hypothetical California statute prohibiting employment of any aliens, even those allowed to work under federal law. The De Canas Court considered, and rejected, such laws. See id. at 358 n.6. California acted to regulate employment, an area where states "possess broad authority under their police powers." Id. at 356. Massachusetts is not acting under its traditional state police powers.[26]

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[26] Additionally, the DeCanas Court considered only whether a state could punish employers for hiring employees who were in the country in violation of federal law. California was attempting to regulate different behavior than was regulated under the INA -- the hiring of illegal aliens, rather than the illegal entry of aliens into the United States. As DeCanas noted, "[t]he central concern of the INA [was] with the terms

Hines and its progeny mean that when Congress legislates in

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and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," not with barring employment of illegal aliens. DeCanas, 424 U.S. at 359. Unlike in Hines, where Congress had acted "in the specific field which the States were attempting to regulate," id. at 362, in De Canas there was "no indication that Congress intended [the INA] to preclude state law in the area of employment regulation," id. The Massachusetts Burma Law, in contrast, clearly lies in the same field and governs the same conduct -- investment in and trade with Burma -- as the federal sanctions against Burma.

Massachusetts also argues that Itel Containers Intern. Corp. v. Huddleston, 507 U.S. 60 (1993), distinguishes this case from Hines. The petitioner in Itel leased cargo containers that were solely used in international shipping. Tennessee assessed sales tax on containers that Itel delivered to lessees within the state's borders. Itel based its "primary challenge" to the law on the international Container Conventions, which prohibit taxation of cargo containers used in international trade provided such containers spend no more than three months in the country. Id. at 64-65. Itel argued that the Conventions barred taxation of leases involving these containers.

Itel Containers does not support Massachusetts's argument. In Itel, as in DeCanas, the challenged state law fell outside the scope of the federal regulatory scheme. The Conventions were adopted to ensure the free flow of containers, and encouraged more efficient containerization in lieu of other, less efficient transportation techniques. Because the tax did not impede importation of containers into Tennessee, the tax was not barred by the conventions. See id. at 66. Moreover, there was no evidence that Congress intended to displace generally applicable state tax schemes. See id. at 70.

an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern. Under this standard we find that Congress has preempted the Massachusetts Burma Law. Congress has constructed a reasonably comprehensive statute covering a field of foreign relations. But even if Congress had not been so comprehensive, the state law would still conflict with the federal law. "The basic subject of the state and federal laws is identical," Hines, 312 U.S. at 61, but Massachusetts's law veers from the carefully balanced path that Congress has constructed. Congress is attempting to balance various concerns and is "trying to steer a middle path." Id. at 73. In enacting sanctions against Burma, Congress attempted to strike at least two sorts of balances. First, Congress sought to improve human rights in Burma, but did so in the context of this country's overall foreign relations, including, at the least, the United States' experiences with human rights practices elsewhere, this country's relationships with its trading partners, its economic interests, and its interest in forming alliances rather than taking unilateral actions. Second, Congress considered various mechanisms to accomplish and balance this country's various interests and goals and chose a set of carefully calibrated tools. This careful calibration reflects the judgment of the Congress and the President that the federal choice of tools is the most effective means to improve human rights conditions in Burma while safeguarding other national interests. Massachusetts, in contrast, has chosen a blunt instrument to further only a single goal, making judgments different from and contrary to the judgments made by Congress and the President.

Congress considered and rejected barring all United States investment in Burma, see S. 1092, 104th Cong. (1995), instead choosing to limit only new investment in the "development of resources." In contrast, the Massachusetts law applies to virtually all investment in Burma. The Federal Burma Law permits some

trade with Burma, while the Massachusetts law does not. For example, the Federal Burma Law does not sanction companies for merely having subsidiaries with operations in Burma, having been organized in Burma, being a majority-owned franchise of a company with Burma operations, or being a United States subsidiary or a foreign company that engages in business in Burma. The Massachusetts law does.

The Massachusetts law thus regulates conduct not covered by the federal law and applies to parties, including foreign companies, not covered by the federal law. As in Hines, the Massachusetts law therefore has effects more inimical to foreign interests than those of the federal law. The Massachusetts law penalizes the activities of foreign companies which are lawful under the laws of those companies' home countries and are not prohibited by trade agreements with the United States or by United States federal law. In addition, the federal law provides for sanctions to be terminated upon a finding by the President that human rights conditions in Burma have improved; the Massachusetts Burma Law has no such provision. In the Federal Burma Law, Congress has chosen to rely on both carrots and sticks. Massachusetts uses a cudgel. In doing so, Massachusetts risks upsetting Congress's careful choice of tools and strategy.

Additionally, Massachusetts's unilateral strategy toward Burma directly contradicts the federal law's encouragement of a multilateral strategy. That the federal government has itself at times acted unilaterally in its approach to Burma, or has created a mechanism that allows the President to fine-tune the federal government's approach, does not eliminate the fact that Massachusetts's unilateral sanctions are inconsistent with the federal regime. Cf. 142 Cong. Rec. S8753 (daily ed. July 25, 1996) (stating that the United States "maintain[s] a range of unilateral sanctions [against] Burma"). The Massachusetts law directly conflicts with Congress's instruction that the federal

government pursue a multilateral strategy with regard to Burma. It is of little importance that some companies can comply with both federal and state laws regarding Burma. Massachusetts's argument to this effect resembles the argument made by the three dissenters in Hines, see Hines, 312 U.S. at 81 (Stone, J., dissenting), an argument that the Hines majority implicitly rejected, see Hines, 312 U.S. at 68 (majority opinion) ("Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax."). Finally, the fact that Congress may have been aware of the Massachusetts law at the time it passed the Federal Burma Law does not lead to a different outcome. In Hines, nineteen states had passed alien registration laws prior to Congress's passage of the federal law, see id., at 79 (Stone, J., dissenting), yet the Supreme Court nevertheless did not conclude from earlier congressional inaction that these laws were not preempted.[27]

Massachusetts protests that the goals of its statute -- promoting change in Burma and expressing disapproval of conditions in Burma -- are the same as those of the federal legislation, and thus that there can be no conflict between the Massachusetts law and federal sanctions. Yet the fact that state and federal legislation share common goals, either in whole or in part, is not sufficient to preclude a finding of preemption. See Gade, 505 U.S. at 103. The crucial inquiry is whether a state law

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[27] Massachusetts argues that the only court to have confronted a similar question, the Maryland court in Board of Trustees, found that federal sanctions against South Africa did not preempt local divestment ordinances. The Maryland case is weak precedent here, however, as the Maryland court did not consider Hines in its discussion of preemption. See Board of Trustees, 562 A.2d at 740-44.

impedes the federal effort. See Gould, 475 U.S. at 286; International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987). Where, as here, the federal government has acted in an area of unique federal concern and has crafted a balanced, tailored approach to an issue, and the state law threatens to upset that balance, the state law is preempted. Under the Supremacy Clause, the Massachusetts Burma Law is unconstitutional. Cf. Missouri v. Holland, 252 U.S. 416 (1920).

V

The passage of the Massachusetts Burma Law has resulted in significant attention being brought to the Burmese government's human rights record. Indeed, it may be that the Massachusetts law was a catalyst for federal sanctions. Massachusetts also played a role, through its representatives in the House and the Senate, in Congress's decision to impose sanctions on Burma. Nonetheless, the conduct of this nation's foreign affairs cannot be effectively managed on behalf of all of the nation's citizens if each of the many state and local governments pursues its own foreign policy. Absent express congressional authorization, Massachusetts cannot set the nation's foreign policy.[28]

The judgment of the district court is affirmed.

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[28] We acknowledge with appreciation the able advocacy by counsel for the parties as well as the assistance provided by the fourteen briefs representing more than 100 amici curiae.

United States Court of Appeals

For the First Circuit

No. 98-2304

NATIONAL FOREIGN TRADE COUNCIL,

Plaintiff, Appellee,

v.

ANDREW S. NATSIOS, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, in his official capacity as State Purchasing Agent for the Commonwealth of Massachusetts,

Defendants, Appellants.

JUDGMENT

Entered: June 22, 1999

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon the consideration whereof, it is now ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court,
Phoebe Morse, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 98-10757-JLT

NATIONAL FOREIGN TRADE COUNCIL,)
)
Plaintiff,)
)
v.)
)
CHARLES D. BAKER,)
in his official capacity as Secretary of)
Administration and Finance of the)
Commonwealth of Massachusetts, and,)
Philmore Anderson, III, in his official capacity)
as State Purchasing Agent for the)
Commonwealth of Massachusetts,)
Defendants.)

MEMORANDUM

November 4, 1998

TAURO, Chief Judge.

Plaintiff National Foreign Trade Council ("NFTC") brings this action against two officials of the Commonwealth [1] seeking a declaratory judgment that the so-called "Massachusetts Burma Law" [2] is unconstitutional.

The Massachusetts Burma Law is a procurement statute that prohibits the Commonwealth and its agents from purchasing goods or services from anyone doing business with the Union of Myanmar (formerly known as the Nation of Burma). The statute authorizes the Operational Services Division (OSD), an agency within the Executive Office of Administration and Finance, to establish a "restricted purchase list" of companies "doing business with Burma" as defined by the statute. Once OSD makes a preliminary finding that a company does business with Myanmar, the company can submit a sworn affidavit to refute the finding. OSD then makes a final decision whether to place a company on the "restricted purchase list."

The Commonwealth is allowed to procure from a "restricted purchase list" company only when: (1) the procurement is essential and the restriction would eliminate the only bid or offer, or would result in inadequate competition, M.G.L.A. ch. 7, § 22H(b); (2) the Commonwealth is purchasing certain medical

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[1] Charles D. Baker, the Secretary of Administration and Finance of the Commonwealth of Massachusetts, and Philmore Anderson, III, the State Purchasing Agent for the Commonwealth of Massachusetts.

[2] Act of June 25, 1996, Chapter 10, § 1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, Ch. 7, §§ 22G-22M.

supplies, § 22I; or (3) there is no "comparable low bid or offer"[3] by an unrestricted bidder, § 22H(d).

Plaintiff claims that the Burma Law is invalid because it (1) intrudes on the federal government's exclusive power to regulate foreign affairs; (2) discriminates against and burdens international trade in violation of the Foreign Commerce Clause; and (3) is preempted by a federal statute and an executive order imposing sanctions on Myanmar.

Before the court are the parties' cross motions for summary judgment. For reasons stated below, the court finds that the Massachusetts Burma Law impermissibly infringes on the federal government's power to regulate foreign affairs.

I.

ANALYSIS

A. STANDING

Defendants argue that Plaintiff[4] lacks standing to sue because its members have not been injured by the Burma Law. The Supreme Court's test for organizational standing provides that an association may sue on behalf of its members if: "(a) its members

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[3] A "comparable low bid," as defined by the statute, is one that is up to 10% higher than a bid from a company on the restricted list. In essence, a company on the "restricted purchase list" can only win the bid if its offer is at least 10% lower than the lowest bid by an unrestricted company.

[4] Plaintiff NFTC, a nonprofit corporation, has strongly advocated open international trade and investment since its founding in 1914.

would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Plaintiff NFTC satisfies the first prong of the *Hunt* test. As shown by the parties' Joint Stipulation, NFTC members on the "restricted purchase list" cannot bid on Massachusetts contracts on an equal basis.[5] Those members could, therefore, sue on an individual basis. *See Clinton v. City of New York*, 118 S.Ct. 2091, 2100 (1998) (holding that "Probable economic injury resulting from [governmental actions] that alter competitive conditions" satisfy the 'injury-in-fact' requirement of Article III and, therefore, anyone who is "likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test") (quoting 3 K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed.1994)). *See also Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that the plaintiff had standing because it was

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[5] The parties have stipulated that: (1) more than thirty NFTC members are on the "restricted purchase list;" (2) some NFTC members have severed their business connections with Myanmar, thereby affecting their competitive edge in the global market; (3) at least one member, who had contracts with Massachusetts in the past, did not bid on new contracts because of the statute; and (4) at least one member on the "restricted purchase list" lost a contract prior to joining NFTC because its bid was not 10% lower than the winning bid. See Joint Stipulation pp 30, 36-37, 32, and 38.

"able and ready to bid on contracts and that a discriminatory policy prevent[ed] it from doing so on an equal basis").

Plaintiff also satisfies the second prong of *Hunt*. The Joint Stipulation states, "Founded in 1914, the NFTC has historically represented its members' interests in the area of foreign trade." Joint Stipulation p 2. *See also* Declaration of Frank D. Kittredge p 5. The NFTC is "organized and authorized to represent the interests of its members in free international trade and commerce." The NFTC Resolution of April 21, 1998, Exhibit 2 of the Joint Stipulation. Challenging statutes like the Massachusetts Burma Law, which acts as a barrier to free trade, is "germane" to the organization's purpose.

Plaintiff seeks declaratory judgment prohibiting enforcement of the Burma Law. Neither the claims nor the relief requested in Plaintiff's Complaint requires participation by individual members. Plaintiff, therefore, satisfies the third prong of the *Hunt* test, and has standing to bring this action on behalf of its members.

B. CONSTITUTIONALITY OF THE MASSACHUSETTS BURMA LAW

1. The Constitution Grants Federal Government Exclusive Authority Over Foreign Affairs

Under our constitutional framework, the federal government has exclusive authority to conduct foreign affairs. Numerous constitutional provisions evidence the Framers' intent to vest plenary power over foreign affairs in the federal government. Article I, § 8, cls. 1 and 3 give Congress sole authority to provide for the common defense, and to regulate commerce with foreign nations. Article II, § 2, cl. 2 authorizes the President to make treaties and appoint ambassadors. Article I, § 10, cls. 1-3 prohibit

the states from making treaties, entering into agreements with other countries, or imposing duties on imports and exports. These provisions demonstrate that "one of the main objects of the Constitution [was] to make us, as far as regarded our foreign relations, one people, and one nation." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840).

The Supreme Court has consistently recognized the exclusive role assigned to the federal government in the area of foreign affairs. The Court has admonished, "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942); *see also United States v. Belmont*, 301 U.S. 324, 331 (1937) ("Complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.").

The Supreme Court, in *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968), declared invalid state laws with more than "some incidental or indirect effect in foreign countries," or that have "great potential for disruption or embarrassment" of United States foreign policy. *Zschernig* involved a probate law that conditioned the right of a nonresident alien to inherit property from an Oregon resident on reciprocal treatment by the beneficiary's country of origin. Even though probate matters are within the traditional jurisdiction of the states, and even though the Oregon statute was facially neutral, the Supreme Court struck it down under the foreign affairs doctrine, because of its possible effect on foreign nations. *Id. Zschernig* teaches that states and municipalities must yield to the federal government when their actions affect significant issues of foreign policy.

2. Massachusetts Burma Law Impermissibly Burdens U.S.-Foreign Relations

The Massachusetts Burma Law has more than an "indirect or incidental effect in foreign countries," and a "great potential for disruption or embarrassment." *Zschernig*, 389 U.S. at 434-35. It, therefore, unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs.

The Commonwealth concedes that the statute was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policies. Indeed, its legislative history makes this intent clear. Representative Rushing of the Massachusetts House of Representatives stated that "if you're going to engage in foreign policy, you have to be able to identify a goal that you will know when it is realized .... [T]he identifiable goal is, free democratic elections in Burma." MA House Debate on H2833: July 19, 1995, transcript at 4-5. State Senator Hicks criticized the bill as an improper attempt to make foreign policy: "This particular body has no particular responsibility to make a statement on this ... international matter. [T]he appropriate forum ... would be the U.S. Congress." MA Senate Debate on H2833: April 10, 1996, transcript at 10. The amicus briefs here as well as the Joint Stipulation further demonstrate the Burma Law's disruptive impact on foreign relations. The European Union (EU), as an amicus, observes that the Massachusetts Burma Law: (1) interferes with the normal conduct of EU-U.S. relations; (2) raises questions about the ability of the U.S. to honor international commitments it has entered in the framework of the World Trade Organization (WTO); and (3) poses a great risk to the proliferation of similar state sanction laws, which in turn

would aggravate international tensions.[6] *See* EU Brief, p. 2; *see also* Joint Stipulation p 40 & Exhibit 15, Ambassador Hugo Paeman's Letter to then-Governor Weld of Massachusetts (stating that the Burma Law is a breach of the WTO agreements, and would have a "damaging effect on bilateral EU-US relations"). Japan and the Association of the South East Asian Nations (ASEAN) also filed complaints against the statute with the U.S. government. *See* Joint Stipulation, p 42. Both EU and ASEAN formally noted their oppositions to the Burma Law at the WTO in June and July of 1997. *See* Joint Stipulation, pp 41- 42.

Defendants argue that the Burma Law does not intrude on the federal government's foreign affairs power because: (1) the Constitution permits certain state actions that indirectly affect foreign affairs; (2) the Burma Law does not establish a direct contact between the state and the Nation of Myanmar; (3) important state interests embodied in the First and Tenth Amendments justify the statute; and (4) as the foreign affairs' doctrine is itself "vague," the court should leave to the legislative branch the issue of whether to invalidate the Massachusetts Burma Law and similar state procurement statutes.

Defendants first challenge the scope of the foreign affairs power, and argue that the Burma Law does not infringe on what they view as a more limited federal government power. In an attempt to confine the federal government's foreign relations power, Defendants cite the following federal and state court decisions upholding selective purchasing and divestment statutes. *Trojan Tech., Inc. v. Com. of Pennsylvania*, 742 F.Supp. 900, 903

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[6] There are currently eighteen municipal sanction laws issued against Myanmar. *See* Joint Stip., p. 44. Massachusetts itself is planning to introduce a similar legislation against Indonesia. *Id.* at exhibit 15.

(M.D.Pa.1990), aff'd, 916 F.2d 903, 913-14 (3d Cir.1990) (upholding a Pennsylvania statute that required U.S.-made steel in all state construction projects); *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 562 A.2d 720, 744 (Md.1989) (upholding a Baltimore statute that withdrew city's investments from South Africa); and *K.S.B. Technical Sales Corp. v. New Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774, 782-84 (N.J.1977) (upholding a New Jersey "Buy American" statute).[7]

None of these cases is persuasive precedent with respect to the circumstances at issue here. *Trojan*, 742 F.Supp. 900, 903-04, and *K.S.B. Technical Sales*, 75 N.J. 272, 381 A.2d 774, 782-84, involved "Buy American" statutes, whose purpose and effect were to create jobs and promote economic development at home. Although these statutes benefitted Americans economically, they did not single out a particular foreign country for particular treatment, as does the Massachusetts Burma Law. The Third Circuit specifically distinguished the statute in *Trojan* from the one in *Zschernig* on this basis. *See* 916 F.2d at 913 (holding that the Pennsylvania statute applied to "steel from any foreign source, regardless of whether the source country might be considered friend or foe," and therefore, unlike the Oregon statute struck down in *Zschernig*, did not involve the state in the conduct of foreign affairs). Furthermore, at least one court has held that even Buy-American statutes may violate the foreign affairs doctrine. *See Bethlehem Steel Corp. v. Board of Com'rs*, 276 Cal.App.2d 221, 224-26, 80 Cal.Rptr. 800 (1969) (holding unconstitutional a

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[7] *North American Salt Co. v. Ohio Dept. of Transp.*, 122 Ohio App.3d 213, 701 N.E.2d 454, 1997 WL 447643 (Ohio App. 10 Dist.1997) recently joined this line of state precedents, wherein the Court of Appeals of Ohio upheld an Ohio "Buy American" statute.

California "Buy American Law" that awarded state construction contracts only to companies that agreed to use American-made products).

The Baltimore statute in *Board of Trustees* required the City to withdraw its investments in South Africa. *See* 317 Md. 72, 562 A.2d 720. Unlike the Massachusetts Burma Law, the Baltimore statute only modified the City's own conduct, and did not seek to influence individuals or companies in their private commercial activities. *Id.*

Several lower federal and state court decisions support the conclusion that the Burma Law unconstitutionally burdens the federal foreign affairs power. In *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill.2d 221, 104 Ill.Dec. 743, 503 N.E.2d 300, 305 (Ill.1986), the Illinois Supreme Court held unconstitutional a provision that exempted sales tax on all rare coins except for South African Krugerrands. In *New York Times Co. v. City of New York Comm'n on Human Rights*, the New York Court of Appeals reversed New York City Commission on Human Rights's ruling and upheld New York Time's practice of accepting employment advertisements from South African employers. *See* 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963, 968 (N.Y.1977) ("Even longstanding State regulation of traditional fields of law, such as the rules governing the descent and distribution of estates, must fall by the wayside if enforcement of State regulations would 'impair the effective exercise of the Nation's foreign policy.' ") (quoting *Zschernig*, 389 U.S. at 440). In *Tayyari v. New Mexico State Univ.*, 495 F.Supp. 1365, 1376 (D.N.M.1980), the U.S. District Court for the District of New Mexico invalidated a motion passed by the Regents of the State University that denied Iranian students admissions and readmissions until the return of American hostages. The District Court held that the Regents' true purpose was "to make a political statement." *Id.* at 1376. These holdings are consistent with the

Supreme Court's decision in *Zschernig*, and bolster the conclusion that the Massachusetts Burma Law is an unconstitutional infringement on the federal government's power over foreign affairs.

In another effort to avoid the sweep of the foreign affairs doctrine, Defendants argue that the Burma Law does not establish direct contact between Myanmar and the Commonwealth. This is true, but irrelevant under the *Zschernig* test. *Zschernig* examines the substantive impact a state statute has on foreign relations. *See* 389 U.S. at 434-35. The Massachusetts Burma Law was designed with the purpose of changing Burma's domestic policy. This is an unconstitutional infringement on the foreign affairs powers of the federal government. State interests, no matter how noble, do not trump the federal government's exclusive foreign affairs power. *Cf. U.S. v. Pink*, 315 U.S. 203, 233 (1942); *U.S. v. Belmont*, 301 U.S. 324, 331 (1937).

Plaintiff also argues that the statute is invalid because (1) federal law preempts the Massachusetts Burma Law; and (2) the Massachusetts Burma Law violates the Foreign Commerce Clause. Because neither argument is dispositive in this case, this opinion does not address them in detail, but offers the following observations.

Plaintiff argues that "actual conflict" between the Omnibus Consolidated Appropriations Act of 1997 and the Massachusetts Burma Law impliedly preempts the Burma Law.

To establish preemption, Plaintiff must show that Congress intended to exercise its authority to set aside a state law. *See Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 67 (1st Cir.1997). Plaintiff's burden is particularly heavy because Plaintiff argues implied, rather than express, preemption. *Id.* Plaintiff has failed to carry this burden.

The alleged main conflict between the statutes was the federal government's intent to utilize multilateral sanctions with other nations and the Burma Law's unilateral approach. This argument is not persuasive, because the federal statute actually provides for unilateral sanctions against Myanmar. The evidence does not establish sufficient actual conflict for this court to find implied preemption. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (courts will not infer preemption based on speculation; conflict must be real).

Plaintiff offers the Foreign Commerce Clause as another ground for invalidating the Massachusetts Burma Law. *See* U.S. Const., art. I, § 8, cl. 3; *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (holding that state regulations that discriminate against foreign commerce or impede the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments" are unconstitutional). Defendant raises as a defense the market-participant exception to the dormant Commerce Clause. *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983). Although the Third Circuit has extended this exception to foreign commerce, neither the Supreme Court nor the First Circuit has addressed the issue. *See Trojan Tech., Inc. v. Com. of Pennsylvania*, 916 F.2d 903, 909-13 (3d Cir.1990) (holding that "Buy American" statutes which affect foreign commerce are not subject to review under the Foreign Commerce Clause).

This court need not decide whether or how the market-participant exception applies to foreign commerce, as the Massachusetts Burma Law is an unconstitutional infringement of federal government's power over foreign affairs.

Massachusetts' concern for the welfare of the people of Myanmar as manifested by this legislative enactment, may well

be regarded as admirable. But, under the exclusive foreign affairs doctrine, the proper forum to raise such concerns is the United States Congress.

C. MOTION TO AMEND THE COMPLAINT

Plaintiff seeks to amend its Complaint to allege a 42 U.S.C. § 1983 violation by the state officials, which would entitle Plaintiff to attorneys' fees under § 1988. As this motion is unopposed and would not prejudice Defendants, it is allowed.

II.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment and its unopposed Motion to Amend the Complaint are ALLOWED. Defendants' Cross Motion for Summary Judgment is DENIED.

Joseph L. Tauro
Chief Judge
United States District Court
District of Massachusetts

Mass. Gen. Laws Ann. ch. 7. (West 1999 Supp.)

Section 22G. Definitions. For the purposes of sections twenty-two H to twenty-two M, inclusive, the following words shall, unless the context indicates otherwise, have the following meanings:--

"Comparable low bid or offer", a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service.

"Distribution agreement", an agreement to guarantee a contract for the supply of goods or a service.

"Doing business with Burma (Myanmar)",

(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;

(b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;

(c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);

(d) providing any goods or services to the government of Burma (Myanmar).

"Essential", necessary in order that an agency or authority may perform its mission, there being no substitute, to avoid irreparable harm to agency or authority programs.

"Franchise", authorization by a person to sell his products.

"Government of Burma (Myanmar)", any public or quasi-public entity operating within Burma (Myanmar), including, but not limited to, municipal, provincial, national or other governmental and military bodies, including all departments and agencies of such bodies, public utilities, public facilities, or any national corporation in which Burma (Myanmar) has a financial interest or operational responsibilities.

"License", permission granted by a person to another, or to the government of Burma (Myanmar), to exercise a certain privilege or to carry on a particular business.

"Majority-owned subsidiary", a company that is at least fifty-one percent owned by another company.

"Person", any individual and any partnership, firm, association, corporation, or other entity, or their subsidiaries.

"Secretary", the secretary of administration and finance.

"State agency", all awarding authorities of the commonwealth, including, but not limited to, all executive offices, agencies, departments, commissions, and public institutions of higher education, and any office, department or division of the judiciary.

"State authority", shall include, but not be limited to the: Bay State Skills Corporation, centers of excellence, Community

Economic Development Assistance Corporation, Community Development Finance Corporation, Government Land Bank, Massachusetts Bay Transportation Authority, Massachusetts Business Development Corporation, Massachusetts Capital Resource Company, Massachusetts Convention Center Authority, Massachusetts Corporation for Educational Telecommunications, Massachusetts educational loan authority, Massachusetts Health and Educational Facilities Authority, Massachusetts Higher Education Assistance Corporation, Massachusetts Housing Finance Agency, Massachusetts Horse Racing Authority, Massachusetts Industrial Finance Agency, Massachusetts Industrial Service Program, Massachusetts Legal Assistance Corporation, Massachusetts Port Authority, Massachusetts Product Development Corporation, Massachusetts Technology Development Corporation, Massachusetts Technology Park Corporation, Massachusetts Turnpike Authority, Massachusetts Water Resources Authority, Nantucket Land Bank, New England Loan Marketing Corporation, pension reserves investment management board, State College Building Authority, Southeastern Massachusetts University Building Authority, Thrift Institutions Fund for Economic Development, University of Lowell Building Authority, University of Massachusetts Building Authority, victim and witness board, and the Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority.

§ 22H. Procurement of goods or services from bidders or offerors on restricted purchase list

(a) Except as otherwise provided in this section, a state agency, a state authority, the house of representatives or the state senate may not procure goods or services from any person listed on the restricted purchase list maintained by the secretary, or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed.

(b) A state agency, a state authority, the house of representatives or the state senate may procure goods or services from a person who is on or who is so determined to meet the criteria of the restricted purchase list only after certifying in writing to the secretary or, in the case of a state authority, to the chief operating officer that:

(1) the procurement is essential; and

(2) compliance with paragraph (a) would eliminate the only bid or offer, or would result in inadequate competition.

(c) In any solicitation, a state agency, a state authority, the house of representatives or the senate shall provide ample notice of the requirements of this section. Prior to reviewing responses to bid documents for any procurements, or, if there are none, prior to entering into any contractual arrangement, the awarding authority shall obtain from such person seeking a contract a statement, under the pains and penalties of perjury, from an authorized representative of such person seeking a contract, on a form to be provided by the awarding authority, declaring the nature and extent to which said person is engaging in activities which would subject said person to inclusion on the restricted purchase list.

(d) In any procurement that includes bidders or offerors who are on or meet the criteria of the restricted purchase list, the awarding authority may award the contract to a person who is on or who meets the criteria of the restricted purchase list only if there is no comparable low bid or offer by a person who is not on the restricted purchase list.

(e) A person with operations in Burma (Myanmar) for the sole purpose of reporting the news, or solely for the purpose of providing goods or services for the provision of international telecommunications shall not be subject to the provisions of sections twenty-two G to twenty-two M, inclusive.

§ 22I. Purchase of medical supplies by state agencies

Notwithstanding the provisions of section twenty-two H, a state agency may purchase medical supplies intended to preserve or prolong life or to cure, prevent, or ameliorate diseases, including hospital, nutritional, diagnostic, pharmaceutical and non-prescription products specifically manufactured to satisfy identified health care needs, or for which there is no medical substitute. The determination of whether no medical substitute exists shall be made by the state agency requiring the supply, pursuant to general standards of good medical and professional practice. The state agency shall give notice to the state purchasing agent in writing, certifying compliance with this exemption, said notice and certification being sufficient to allow the purchase of medical supplies under this exemption.

To the extent that a person doing business in Burma (Myanmar) is providing only medical supplies, as described hereinabove, to persons in Burma (Myanmar), then the supply of goods or equipment to the commonwealth by said person shall also be exempt from the preference requirements of these

regulations. This exemption from the preference requirements shall not apply in any case in which the nature of any person's business dealings in Burma (Myanmar) include both medical and non-medical supplies.

Any person from whom a procurement would be restricted under this section shall not supply goods or services to any state agency, state authority, the house of representatives or senate under any other provision of this chapter, or any other general or special law.

§ 22J. Restricted purchase list; persons doing business with Burma (Myanmar)

(a) The secretary shall establish and maintain a restricted purchase list. The restricted purchase list shall contain the names of all persons currently doing business with Burma (Myanmar).

(b) In establishing the restricted purchase list, the secretary shall consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources. The secretary shall also place the name of any person who, in the statement described in section twenty-two H, declared that he meets the criteria for being so listed.

(c) The restricted purchase list shall be updated at least once every three months.

(d) The secretary shall provide the lists to all state agencies and state authorities and to the house of representatives and to the senate.

§ 22K. Promulgation of regulations

The secretary is hereby authorized and directed to promulgate regulations to assure the timely and effective implementation of sections twenty-two G to twenty-two M, inclusive.

§ 22L. Void contracts

Any contract entered into in violation of sections twenty-two G to twenty-two M, inclusive, shall be void.

§ 22M. Annual report of compliance

Annually on or before January first, the secretary shall file a report with the clerks of the senate and the house of representatives detailing compliance with sections twenty-two G to twenty-two M, inclusive.

(5)

Supreme Court, U.S.
FILED
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No. 99-474

IN THE
Supreme Court of the United States

ANDREW S. NATSIOS, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, State Purchasing Agent,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MEMORANDUM FOR RESPONDENT NATIONAL FOREIGN TRADE COUNCIL

Of Counsel:

MICHAEL A. COLLORA
DAVID M. OSBORNE
DWYER & COLLORA
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 371-1000

TIMOTHY B. DYK
Counsel of Record
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

3PP

QUESTIONS PRESENTED

1. Whether the First Circuit correctly held that the Massachusetts Burma Law, Mass. Gen. Laws. ch. 7, §§ 22G-22M — which was undisputedly enacted to condemn the Nation of Myanmar and influence the conduct of its government — unconstitutionally infringes upon the federal government's exclusive authority to regulate foreign affairs.

2. Whether the Massachusetts Burma Law, which discriminates against foreign commerce, violates the "speak-with-one-voice" principle, and seeks to regulate extraterritorial activity in a foreign nation, violates the Foreign Commerce Clause.

3. Whether the Massachusetts Burma Law, which upsets the delicate balance established by federal Myanmar sanctions, is preempted by federal law.

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MEMORANDUM OF THE NATIONAL FOREIGN TRADE COUNCIL

Respondent The National Foreign Trade Council ("NFTC") hereby responds to the Petition for a Writ of Certiorari ("Pet.") filed by Petitioners Andrew S. Natsios and Philmore Anderson, III (collectively, "the Commonwealth").[1]

STATEMENT

As the petition correctly states, "The Massachusetts Burma Law effectively requires state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do business with Burma," a country now known as Myanmar. Pet. 6 (citing Mass. Gen. Laws ch. 7, § 22H(d)). "Doing business with Burma" is defined expansively by the Massachusetts Burma Law, as (1) having any place of business, lease, franchise or distribution agreement in Burma; (2) being the majority-owned subsidiary, licensee or franchisee of a company that has such contacts with Burma; (3) providing any goods or services, including financial or consulting advice, to the government of Burma; or (4) "promoting the importation or sale of gems, timber, oil, gas, or other related products, commerce in which is largely controlled by the government of Burma." Pet. App. 88a-89a (Mass. Gen. Laws ch. 7, § 22G). Under the Law, petitioners prepare and circulate a restricted purchase list, identifying companies known to do business in Burma. Pet. App. 93a (Mass. Gen. Laws ch. 7, § 22(J)). The "ten-percent bidding penalty [works] . . . an effective exclusion from the bidding process." Pet. App. 57a.

There is no dispute that the Commonwealth's sole purpose in enacting this law was to affect the domestic policies of a foreign nation. The bill's sponsor himself characterized the law as a "foreign policy" initiative whose "identifiable goal" was

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[1] Pursuant to this Court's Rule 29.6, Respondent The National Foreign Trade Council states that it is a nonprofit corporation with no corporate parents, subsidiaries, or affiliates.

"free democratic elections in Burma." Pet. App. 9a. Various Massachusetts senators and representatives described the Burma Law as Massachusetts "engag[ing] in their own little version of foreign policy" (C.A. App. 102-03), "set[ting] up some foreign policy business guidelines" (C.A. App. 110), "dabbl[ing] in foreign affairs" (C.A. App. 112), and "promot[ing] and stand[ing] for civil and human rights" in Burma. C.A. App. 114. The Governor's signing statement likewise characterized the Massachusetts Burma Law as "'mak[ing] a stand for the cause of freedom and democracy around the world.'" Pet. App. 9a. Neither the sponsor of the bill, nor the legislators who debated the bill, nor the Governor who signed it into law, made any mention of any economic benefit to the Commonwealth, its agencies, or its citizens. *See* Pet. App. 10a. The purpose, as Massachusetts conceded below (Pet. App. 9a), was rather "'to apply indirect economic pressure against the Burma regime for reform.'"

The economic impact of the statute has been substantial. As the court below noted (Pet. App. 9a), the law "effectively force[s] businesses to choose between doing business in Burma or with Massachusetts." When Governor Weld signed the Law, he called it "'more than symbolic action'" that would "'affect millions of dollars in state business.'"[2] Each year the Commonwealth and its agencies purchase at least $2 billion worth of supplies and services; the Law covers every purchase with few exceptions. (C.A. App. 87) Foreign trade with Myanmar generates nearly $2.3 billion annually in revenues, including trade in products such as timber, oil and gas. *Id.* Not surprisingly, companies historically have done business with both Massachusetts and Myanmar. *Id.*

The Law's impact is perhaps best measured by the broad scope of the restricted purchase list. When the complaint was

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[2] M. Vaillancourt, *Massachusetts Becomes First State to Boycott Burma Business*, Boston Globe, June 26, 1996, at 27.

filed, the list contained 346 companies. C.A. App. 83. Forty-four were United States companies, of which 15 were Fortune 500 companies. *Id.* The total annual revenue of the publicly traded United States companies on the list exceeded $246 billion. *Id.* Many foreign companies with U.S. subsidiaries and affiliates also appeared on the list. *Id.* According to the Law's sponsor, at least 13 companies have exited Myanmar since the Law's passage. C.A. App. 323. NFTC members have chosen to cease doing business in Myanmar to avoid sanctions and have been penalized by Massachusetts for continuing to do business in Myanmar. Pet. App. 10a, 13a.

Shortly after Massachusetts enacted its Burma Law, Congress in 1996 carefully crafted a foreign-relations statute aimed at altering the political conditions in Myanmar. This statute (i) prohibited all but humanitarian assistance to the Myanmar government; (ii) directed the Executive Branch to vote against assistance to Myanmar in international financial institutions; and (iii) barred Myanmar officials from entering the United States. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166. The mandated sanctions did not include trade sanctions, but Congress authorized the President to impose trade sanctions if warranted. Additionally, Congress directed the President to develop a multilateral strategy for pressuring the Myanmar government to change its ways, and allowed him to restrict only "new investment" in "development of resources" in Myanmar, and not contracts for goods, services, or technology. *Id.* §§ 570(b), (c), (f). The President also was authorized to waive sanctions if "he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." *Id.* § 570(e) (Pet. App. 12a).

In May 1997, President Clinton endorsed Congress's approach and exercised the congressionally delegated authority to impose trade sanctions, consistent with the limitations set

forth by Congress. *See* President's Message to Congress Transmitting Executive Order No. 13,047 (May 20, 1997); Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997). Unlike the Massachusetts Burma Law, the federal sanctions do not penalize companies for doing business in or with Myanmar unless new investment is involved, and they do not apply at all to foreign companies. The purpose of the federal law and executive order, as evidenced by their structure and history, was to pursue a carefully crafted balance between too-harsh sanctions, which would eliminate the possibility of further influencing the Myanmar regime, and too-lenient sanctions that would be ineffective.[3] Neither the federal statute itself nor the implementing executive order in any way suggested that separate state or municipal action was desirable or appropriate in this area.

Following enactment of the Massachusetts Burma Law, at least sixteen other jurisdictions have enacted similar ordinances and resolutions,[4] and at least six others have rejected or

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[3] *See* A.P. Larson, *State and Local Sanctions: Remarks to the Council of State Governments* (Dec. 8, 1998) at 3-4 ("These measures reflect a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there."); S.1092, 104th Cong., 1st Sess. (1995) (Congress rejected an amendment that would have prohibited all United States investment in Myanmar); 142 Cong. Rec. S8746 (daily ed. July 25, 1996) (Senator Cohen opposed mandatory sanctions because such sanctions would "relinquish all of [the United States'] . . . remaining leverage in Burma . . . [and] further bind the hands of this and any future administrations, taking away those tools of diplomacy — incentives . . . which are crucial").

[4] *See, e.g.*, Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.32 (1999); Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.36 (1999); Amherst, Mass., Annual Town Mtg. Art. 43 (May 14, 1997); Berkeley, Cal., Res. No. 59-853-N.S. (Jan. 12, 1999); Brookline, Mass., Res. Spec. Town Mtg. (Nov. 4, 1997); Cambridge, Mass., City Council Res. (July 27, 1998);

declined to enact such legislation, in part out of concern that the proposed legislation was an inappropriate and unconstitutional effort to make foreign policy.[5]

Several foreign nations have expressed objections to the Burma Law. Pet. App. 10a. The Association of South East Asian Nations ("ASEAN") and Japan have expressed serious concerns to the federal government regarding the Massachusetts Law. C.A. App. 328-29; C.A. App. 330-32. In 1997, the EU and Japan each lodged complaints with the World Trade Organization ("WTO"), condemning the law as a violation of the United States' international obligations. C.A. App. 169; C.A. App. 167-68.

On April 30, 1998, the NFTC filed suit against the Commonwealth officials charged with administering and enforcing this law, seeking a declaratory judgment that the Massachusetts Burma Law was unconstitutional, as well as a permanent injunction barring its enforcement. C.A. App. 10-28. The NFTC's claim was supported by several briefs *amicus curiae*, including briefs filed by the European Union and its

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Chapel Hill, N.C., Res. 97-1-13/R-16 (Jan. 13, 1997); Los Angeles, Cal., Admin. Code, Ord. No. 138,300 div. 10, art. 12 (1999); New York, N.Y., Local Law No. 33 (May 30, 1997); Newton, Mass., Ord. V-146 (Nov. 3, 1997); Palo Alto, Cal., Res. 7715 (Oct. 20, 1997); Portland, Or., Res. 35710 (July 8, 1998); Quincy, Mass., Municipal Code, Title 2, Ch. 2.48 (1997); Santa Cruz, Cal., Res. NS-23,401 (July 8, 1997); Somerville, Mass., Ord. No. 1998-1, § 2-386 (Feb. 1998); Takoma Park, Md., Ord. 1996-33 (Oct. 1996); West Hollywood, Cal., Municipal Code, Sec. 2701 (1998).

[5] *See, e.g.*, Cal. A.B. 888, 1997-98 Regular Sess. (Cal. 1998); Conn. H.R. 6354, Jan. Sess. 1997 (Conn. 1997); S.354 1998 Regular Sess. (Md. 1998); N.C. S.1054, 1997 Sess. (N.C. 1997); N.Y. A.B. 9147, 1998 Sess. (N.Y. 1998); S.984, Jan. Sess. 1997 (R.I. 1997).

Member Countries and organizations representing American business.[6]

The parties entered into a lengthy stipulation of facts. On cross-motions for summary judgment, both sides agreed that there was no factual dispute, including no dispute concerning the deplorable human rights situation in Burma. After briefing and oral argument, the district court held that the NFTC had standing and that the Massachusetts Burma Law unconstitutionally interfered with the federal government's exclusive authority to conduct foreign affairs. The court permanently enjoined the enforcement of that law. Pet. App. 81a. The district court did not decide whether the Massachusetts statute also violated the Foreign Commerce Clause or was preempted by federal law, though it expressed doubt as to the preemption claim. Pet.App. 85a-86a.

On the Commonwealth's appeal, the First Circuit affirmed in a lengthy and thorough opinion, holding that the Massachusetts Burma Law was invalid on all three grounds urged by the NFTC: The Law interfered with the federal government's exclusive power to conduct foreign affairs; it violated the Foreign Commerce Clause; and it was preempted by the federal government's different, and narrower, sanctions directed at the Nation of Myanmar. Pet. App. 1a-73a.

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[6] On appeal, the NFTC received *amicus curiae* support from the European Union and its Member Countries, organizations representing American business, foreign government officials and Members of Congress. Pet. App. 2a-5a. Massachusetts, in turn, was supported by other states and municipalities, claiming the right to enact and enforce their own sanctions legislation, by other Members of Congress, and by various human rights organizations supporting the Commonwealth's efforts to impose sanctions on the Myanmar government. Pet. App. 2a-4a.

ARGUMENT

I. THE DECISION BELOW WAS CORRECT AND DOES NOT CREATE A CONFLICT

The petition presents four questions for this Court's review. Each was decided correctly by the First Circuit, and none presents a conflict with any other decision of this Court, any other court of appeals, or any state supreme court.

A. The Court Of Appeals Correctly Held That The Massachusetts Burma Law Interferes With The Federal Government's Exclusive Authority To Conduct Foreign Policy; There Is No Conflict

1. The Decision Below Is Consistent With This Court's Decision in *Zschernig v. Miller* and All Other Lower Court Decisions

The decision below is mandated by this Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), that state and municipal laws that have more than an "incidental or indirect effect in foreign countries" (*id.* at 432), or that have "great potential for disruption or embarrassment" of United States foreign policy (*id.* at 434), cannot survive. *Zschernig* involved an Oregon probate law that conditioned the inheritance rights of nonresident aliens upon the alien's ability to demonstrate that his country of origin would grant reciprocal rights to a United States citizen, and would not confiscate any of the inherited property. *Id.* at 430-31. Judges under the law searched "for the 'democracy quotient' of a foreign regime," thus intruding impermissibly into "matters which the Constitution entrusts solely to the Federal Government." *Id.* at 435-36. The Oregon law was held to impermissibly intrude into the national government's conduct of foreign affairs.

The foreign-affairs issue presented here has also been considered by a number of lower courts, which have uniformly held that state and municipal efforts to engage in foreign policy

and to impose sanctions in order to influence activities by foreign countries are unconstitutional under this Court's decision in *Zschernig v. Miller*. *See, e.g.*, *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down state sales-tax provision exempting all rare coins except South African Krugerrands); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D. N.M. 1980) (invalidating University policy excluding Iranian students until the return of American hostages); *New York Times Co. v. New York Comm'n on Human Rights*, 393 N.Y.S.2d 312, 317 (N.Y. 1977) (concluding that efforts to apply local anti-discrimination laws to prohibit a newspaper from running ads for employment in South Africa "would impair the effective exercise of the Nation's foreign policy").

The only possible exception to this uniform pattern is the decision of the Maryland Court of Appeals upholding a Baltimore ordinance requiring city pension funds to divest themselves of stocks and bonds of companies doing business in South Africa over a period of two years. *Board of Trustees of Employees' Retirement Sys. v. Mayor and City Council of Baltimore City*, 562 A.2d 720 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990). While the NFTC believes that the *Board of Trustees* case was not correctly decided, the ordinance at issue there was different in scope and effect from the Massachusetts Burma Law: it did not regulate state purchases of goods and services, was not designed to directly influence the conduct of South Africa, and was found to have only a "minimal" effect. *Id.* at 734. Indeed, the court expressly upheld the statute only because of its lack of consequences. As the court there noted, (1) divestment alone would not cause companies to pull out of South Africa; (2) the ordinances provided for gradual divestment to ensure minimal impact; and (3) the ordinance applied "only to investments in companies doing a significant amount of business in South Africa." *Id.* at 747. No claim is made here, and none could be made, that the Massachusetts statute is devoid of practical consequences.

2. *Zschernig* Was Correctly Decided

Nonetheless, the Commonwealth urges (Pet. 16-23) that the First Circuit erred by holding that the Massachusetts Burma Law unconstitutionally impedes the federal government's exclusive authority to conduct foreign affairs. Unable to point to any conflicting decision, the Commonwealth effectively urges that *Zschernig v. Miller* was decided incorrectly. There is no basis for this claim.

Placing exclusive power over foreign affairs in the national government was one of the central purposes of the Constitution, for the "major drive wheel in the movement for constitutional reform" was the confused state of foreign affairs under the Articles of Confederation. F. Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 50 (1973). Prior to the Constitution, under the Articles of Confederation, individual states caused at least two major foreign-policy embarrassments by conducting their own foreign relations. In one, several states refused to comply with the British peace treaty; in another, when Britain refused to open the West Indies to American trade, retaliation through sanctions was rendered impossible by the different approaches of the individual states, each of which was empowered to make its own foreign policy. *See* J. Rakove, *Making Foreign Policy — The View From 1787*, in *Foreign Policy and the Constitution* 1, 2 (Goldwin & Licht, eds., 1990). This multitude of foreign-policy voices left foreign governments uncertain about who, exactly, they would be required to negotiate with in the United States; consequently, those governments "regarded the United States as unreliable." Levy, *Federalism and Collective Action*, 45 U. Kan. L. Rev. 1241, 1254 (1997).

It is beyond debate that, under the resulting Constitution, responsibility for conducting foreign relations rested exclusively in the hands of the federal government. Madison, writing in *The Federalist*, urged the importance of placing centralized and

exclusive national authority over foreign relations with the federal government: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist No. 42* (J. Madison). *See also The Federalist No. 80* (A. Hamilton). From the framing onward, this Court has similarly recognized that the Constitution requires a national government with a strong and exclusive voice when it comes to dealings with other nations: A long and unbroken line of cases from this Court holds that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). *See also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("our system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933); *Chae Chan Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581, 606 (1889); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840).

This exclusive federal control necessarily constrains the states. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court held that "rules of international law" such as the "act of state" doctrine could not "be left to divergent and perhaps parochial state interpretations." *Id.* at 425. The act-of-state doctrine "must be treated exclusively as an aspect of federal law," else it be "effectively undermined." *Id.* at 424-25. Five years later, as noted above, this Court in *Zschernig* held that the exclusive federal authority to regulate foreign relations requires that state or municipal laws with more than an "'incidental or indirect effect in foreign countries,'" or that have "great potential for disruption or embarrassment" of United States foreign policy, cannot survive. *Zschernig v. Miller*, 389 U.S. at 432, 434.

Nor does the Tenth Amendment allow states to engage in foreign policymaking. The Tenth Amendment only reserves to the states those "powers not delegated to the Federal Government nor prohibited to the States." *Alden v. Maine*, 119 S. Ct. 2240, 2259 (1999). The conduct of foreign relations, of course, has long been "delegated to the Federal Government" exclusively; it "is not shared by the States." *United States v. Pink*, 315 U.S. at 233. *See* p. 10 *supra*. The Common-wealth does not suggest otherwise.

As the Framers recognized, exclusive federal control is the only sensible approach. If one state could adopt its own foreign policy, all states would suffer the consequences. Some would be political. Some would be economic. Fifty different foreign-trade policies would create significantly higher barriers to trade generally. The increased costs and uncertainty created by such a regime would be felt by every state. Additionally, many of these individually crafted policies would inevitably conflict (*e.g.*, one state might favor trade with a particular country; other states might oppose such trade on non-economic policy grounds — *e.g.*, human-rights violations). And if states can make foreign policies, so can thousands of municipalities, which exponentially increases the potential for conflict and disruption. As the Court of Appeals recognized, "the conduct of this nation's foreign affairs cannot be effectively managed on behalf of all of the nation's citizens if each of the many state and local governments pursues its own foreign policy." Pet. App. 73a.

3. *Barclays* Does Not Undermine *Zschernig*

The Commonwealth claims, however, that this Court's decision in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), undermines *Zschernig*. As the Court of Appeals noted (Pet. App. 35a), "there is simply no indication, in *Barclays* or in any other post-*Zschernig* case that *Zschernig* is not good law."

Barclays did not purport to alter *Zschernig*. Indeed, there is no mention of *Zschernig* in *Barclays*, even though the parties and the United States cited *Zschernig* in their briefs and argument to this Court. Had this Court meant to "undercut" *Zschernig* in *Barclays*, it had every opportunity to do so, but it did not. *Barclays* involved applying the Foreign Commerce Clause's "speak with one voice" component to a neutral state-tax statute that did not "target[] any foreign nation or nations." Pet. App. 35a. There is no basis for applying that reasoning in a case that involves a different aspect of the constitution (the exclusive foreign-affairs power) and a state law with an avowed goal of conducting foreign policy with respect to a particular country. Pet. App. 35a. In any event, as the Court of Appeals correctly noted, even if *Barclays* had any application beyond the Foreign Commerce Clause, there would be no basis for interpreting Congress's failure to explicitly preempt the Massachusetts Burma Law as implied acquiescence in Massachusetts' efforts. Pet. App. 63a.

4. There Is No Market-Participant Exception In the Foreign Relations Area

The Commonwealth's assertion (Pet. 26-27) that the "market-participant exception" applies to the federal foreign relations power as well as to the Foreign Commerce Clause likewise is unfounded. There is no basis for extending the "market-participant exception" from the dormant Interstate Commerce Clause, where the primary concern is economic parochialism, to the foreign-affairs arena, where overall national relations with foreign nations are at stake. As the court below noted (Pet. App. 36a), no court has ever done so. No court has even suggested that there is a plausible argument for doing so. And this Court has rejected at least one other similar attempt to engraft the "market-participant exception" onto another constitutional provision. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219-20 (1984) (rejecting the "distinction . . . between market

participant and . . . market regulator" under the Privileges and Immunities Clause, since "[t]he two Clauses have different aims and set different standards for state conduct").

Additionally, for the reasons set forth in Section I(B) below, even if there were such an exception, the First Circuit correctly held that there is no basis for applying a "market-participant exception" in this case, since the Massachusetts Burma Law is plainly a regulatory measure and not a proprietary one (the latter being the only sort of measure to which a "market-participant exception" could conceivably apply).

The First Circuit's foreign-relations ruling was correct and presents no conflict.

B. The Court of Appeals' Holding That The Massachusetts Burma Law Violates The Foreign Commerce Clause Was Correct And Creates No Conflict

Apart from its market-participant argument, the Commonwealth does not take issue with the Court of Appeals' holding that the Massachusetts Burma Law violates the Foreign Commerce Clause in three different respects: (i) by discriminating against foreign commerce; (ii) by impeding the federal government's ability to speak with one voice in foreign affairs; and (iii) by attempting to regulate extraterritorially, outside the Commonwealth's borders. Pet. App. 52a-57a. The decision below in these respects is consistent with — indeed, compelled by — numerous decisions of this Court. The Commonwealth urges (Pet. 25-27) only that the Court should hold that the Burma Law is protected by a supposed "market-participant exception" to the Foreign Commerce Clause.

To be sure, this Court has previously declined to reach the issue of whether the "market-participant exception" should apply to the Foreign Commerce Clause, and if so, whether it would have the same contours as the "market-participant

exception" to the dormant Interstate Commerce Clause. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980).[7] But the Court of Appeals did not rest its Commerce Clause holding on the inapplicability of the market-participant exception under the Foreign Commerce Clause; rather, it merely expressed its "skeptic[ism]" toward the Commonwealth's claim, which it viewed as "unlikely." Pet. App. 48a. The Court of Appeals noted that "the issues are complex and we choose to leave their resolution to another day and another case" (Pet. App. 50a), but nonetheless "assume[d] arguendo that there is a market participant exception under the Foreign Commerce Clause." Pet. App. 42a. Proceeding from that assumption, the First Circuit held that Massachusetts was not in fact acting as a market participant, but as a market *regulator*, because the Commonwealth was "regulat[ing] activity outside Massachusetts that is not related to the seller's interactions with Massachusetts." Pet. App. 46a.

This decision was not only correct, but was required under this Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), and other cases. In *South-Central Timber*, the Court made it clear that a state cannot avoid Commerce Clause restrictions by incorporating what are essentially regulatory provisions into contract terms and then arguing that it is simply participating in a market. In invalidating an Alaska statute requiring all timber sold from certain state-owned land to be processed in Alaska (*id.* at 84-

[7] This Court has confirmed that "the Founders intended the scope of the foreign commerce power to be . . . greater" than the interstate commerce power granted to the federal government, *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979); thus, "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged." *Reeves*, 447 U.S. at 437-38 n.9. *See also South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n. 7 (1984). Only one lower court decision has ever suggested that there is such an exception under the Foreign Commerce Clause. *See* Pet. App. 36a-37a n.16.

85), the plurality opinion explained that "the [market-participant] doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. *See Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289-91 (1986); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 229 (1993).

Accordingly, the Court below stated:

> Massachusetts's action here is akin to prohibiting purchases from companies that do business in states that have policies with which Massachusetts disagrees. This would plainly be unconstitutional under the domestic Commerce Clause. Massachusetts surely cannot do the same in the international context, as state actions that affect international commerce receive even greater scrutiny than do actions that affect interstate commerce.

Pet. App. 48a. That holding was clearly correct, and is not even alleged to create a conflict.

C. The Court of Appeals' Holding That The Massachusetts Burma Law Is Preempted By Federal Sanctions Against Burma Was Correct And Creates No Conflict

Finally, the Commonwealth accuses the First Circuit of "invert[ing] the presumption against preemption long applied by this Court" (Pet. 28) by holding that when "Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern." Pet. App. 69-70a (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The Court of Appeals' decision creates no conflict on the preemption issue. The Commonwealth identifies none; indeed, its petition urges this Court only that "[t]his error should be reviewed by this Court." Pet. 28. Even so, there was no "error" in the Court of Appeals' preemption ruling: It is well settled that where a state law implicates the national government's foreign-affairs powers, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (quotation omitted). Likewise, a legion of post-*Hines* cases cited by the Court of Appeals hold that an "'Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Pet. App. 66a (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

State laws touching the field of foreign relations, such as the Massachusetts Burma Law, are fundamental examples of laws that "the federal system will be assumed to preclude," since the conduct of foreign affairs is a core and exclusive power of the national government. *See* Section I(A) above. The Commonwealth's effort to recast the Burma Law as one "governing purchasing decisions" and not foreign affairs (Pet. 29) simply "ignores the fact that its law, like the federal sanctions against Burma, is aimed primarily at effecting change in and expressing disapproval of the current regime in Burma." Pet. App. 67a.

Even if the Massachusetts Law were presumed valid, it would still be preempted. As the Court of Appeals noted (Pet. App. 70a), "Massachusetts's Law veers from the carefully balanced path that Congress has constructed" in five different respects:

(1) The Massachusetts Burma Law "applies to virtually all investment in Burma," while the federal sanctions "limit only new investment in the 'development of resources'" (Pet. App. 70a);

(2) The Massachusetts Burma Law permits no trade with Burma, while "[t]he Federal Burma Law permits some trade with Burma" (Pet. App. 70a-71a);

(3) The Massachusetts Burma Law "applies to parties, including foreign companies, not covered by the federal law" (Pet. App. 71a);

(4) The Massachusetts Burma Law has no termination conditions or provision; while "the federal law provides for sanctions to be terminated upon a finding by the President that human rights conditions in Burma have improved" (Pet. App. 71a); and

(5) "Massachusetts's unilateral strategy toward Burma directly contradicts the federal law's encouragement of a multilateral strategy." Pet. App. 71a.

These five findings remain unchallenged by the Commonwealth.

Where Congress has struck such a delicate balance, state legislation that disrupts it is preempted. For example, in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), state licensing acts designed to supplement the federal OSHA standards were preempted. The Court held that states

may not "selectively . . . 'supplement' certain federal regulations with ostensibly nonconflicting standards." *Id.* at 103. The Commonwealth may not "selectively supplement" the federal Burma legislation with its own state sanctions.

The First Circuit's preemption ruling was clearly correct, and creates no conflict.

II. IF THIS COURT BELIEVES THAT THE ISSUES ARE UNSETTLED, CERTIORARI SHOULD BE GRANTED

While the questions presented have not been previously decided by this Court on these facts, the applicable legal principles are well settled and were carefully and correctly applied by the First Circuit. Neither the Commonwealth's spurious claims of conflict nor any asserted "glamour and emotion" of the case (*Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (Blackmun, J., dissenting from denial of certiorari)) should lead this Court to grant certiorari. Nor should this Court assume that the decision below will invalidate country-neutral state and municipal laws barring purchases of goods produced by unfair labor or unsound environmental practices. However, should this Court entertain doubts as to whether the issues have indeed been settled by previous decisions of this Court, the NFTC believes that this would be an appropriate case, and an appropriate time, to consider the issues. This is so for two reasons.

First, as the Commonwealth describes in its Petition (at 13), a significant number of jurisdictions in addition to Massachusetts have adopted their own selective purchasing laws in an effort to coerce change in Myanmar (Burma) as well as other countries.[8] The NFTC believes that these other

[8] *See* Pet. App. 10a; *see also*, p. 4 n.4, *supra*.

jurisdictions should abide by the decision of the First Circuit,[9] particularly in view of its multiple grounds for invalidating the Massachusetts Law. If certiorari is denied, business organizations will appropriately make long-term investment and contractual decisions based on the assumed invalidity of these laws. It would be highly disruptive to effective international trade if some years in the future the Court were to upset these expectations and hold that such laws are constitutional.

Second, if this Court were to conclude that these issues require consideration and resolution, this case would present an appropriate vehicle for doing so. The standing of the plaintiffs is now undisputed and indisputable; the Massachusetts law is clear and representative of those in other jurisdictions; there is a complete absence of factual disputes; and the treatment of these issues by the lower courts is both extensive and thorough. There would be little to be gained by allowing these issues to percolate further in the lower federal courts. If this Court is ever to consider the issue, the interests of all concerned — the business community, the affected jurisdictions and the public at large — are served by avoiding delay in that consideration.

[9] *See, e.g., Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938, 943 (9th Cir. 1998) ("Because of the importance of predictability to commercial relations, as well as deference to our sister circuits, we shall not lightly create an intercircuit conflict affecting commerce nationally."), *cert. denied*, 119 S. Ct. 1454 (1999); *Washington Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996) ("[w]e thus temper the independence of the analysis in which we engage by according great weight to the decisions of the other circuits on the same question").

CONCLUSION

If this Court believes that the issues are unsettled, certiorari should be granted. Otherwise, certiorari should be denied.

Respectfully submitted,

Of Counsel:

MICHAEL A. COLLORA
DAVID M. OSBORNE
DWYER & COLLORA
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 371-1000

TIMOTHY B. DYK
Counsel of Record
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent

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IN THE
Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF MEMBERS OF CONGRESS, AMICI CURIAE: SEN. PAUL WELLSTONE & REPS. NEAL ABERCROMBIE, TAMMY BALDWIN, HOWARD BERMAN, XAVIER BERCERRA, DAVID BONIOR,

(Additional Members of Congress Listed on Inside Cover)

IN SUPPORT OF THE PETITION

JOHN ECHEVERRIA
Counsel of Record
ROBERT STUMBERG
MATTHEW C. PORTERFIELD
THE HARRISON INSTITUTE
FOR PUBLIC LAW
GEORGETOWN UNIVERSITY
LAW CENTER
111 F Street, N.W.
Suite 102
Washington, D.C. 20001-2095
(202) 662-9603

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

SHERROD BROWN, MICHAEL CAPUANO, EVA CLAYTON, WILLIAM DELAHUNT, DANNY DAVIS, PETER DEFAZIO, LANE EVANS, BARNEY FRANK, BENJAMIN GILMAN, LUIS GUTIERREZ, JESSE JACKSON, JR., SHEILA JASKSON LEE, STEPHANIE TUBBS JONES, BARBARA LEE, JOHN LEWIS, MARCY KAPTUR, DENNIS KUCINICH, TOM LANTOS, EDWARD MARKEY, MATTHEW MARTINEZ, CYNTHIA McKINNEY, JAMES McGOVERN, MARTIN MEEHAN, JUANITA MILLENDER-McDONALD, GEORGE MILLER, JOHN JOSEPH MOAKLEY, JERRY NADLER, RICHARD NEAL, JOHN OLVER, JAMES OBERSTAR, WILLIAM PASCRELL. NANCY PELOSI, THOMAS PETRI, RICHARD POMBO, ILEANA ROS-LEHTINEN, DANA ROHRABACHER, LUCILLE ROYBAL-ALLARD, BERNIE SANDERS, JANICE SHAKOWSKI, CHRISTOPHER SMITH, PETE STARK, TED STRICKLAND, JOHN TIERNEY, EDOLPHUS TOWNS, JAMES TRAFICANT, TOM UDALL, HENRY WAXMAN, LYNN WOOLSEY, DAVID WU

QUESTION PRESENTED

May federal courts strike down state procurement laws such as the Massachusetts Burma law as conflicting with federal control over foreign affairs and foreign commerce when Congress has repeatedly refused to preempt such laws?

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INTEREST OF AMICI CURIAE * & SUMMARY OF ARGUMENT

This case deals directly with the authority of Congress to decide whether or not to preempt state law. As members of Congress, *amici curiae* are concerned that unless it is reversed, the decision of the court of appeals in this case will encroach upon that congressional authority. Specifically, *amici curiae* are concerned that the court of appeals failed to defer to Congress's decision not to preempt state and local selective purchasing laws such as the Massachusetts Burma law. In addition, *amici curiae* are concerned that the court of appeals failed to properly apply this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994), in which this Court held that Congress has the primary authority under the Constitution to determine whether to preempt state law based upon foreign policy or foreign commerce concerns.

Amici curiae have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Counsel to the petitioner, Commonwealth of Massachusetts, and counsel to the respondent, National Foreign Trade Council, has consented to the filing of this *amicus* brief.

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* As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of this brief. Funding for preparation of this brief was provided through the institutional support of Georgetown University for the Harrison Institute for Public Law, which is a program for clinical legal education and public interest representation.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *BARCLAYS BANK*, WHICH RECOGNIZES THAT THE CONSTITUTION VESTS CONGRESS, NOT THE FEDERAL COURTS, WITH THE AUTHORITY TO DETERMINE WHETHER TO PREEMPT STATE LAW ON FOREIGN POLICY OR FOREIGN COMMERCE GROUNDS

In this case a "United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." United States Supreme Court Rule 10(c). The decision of the court of appeals in this case conflicts with this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994).

At issue in this case is the Massachusetts Burma law, a "selective purchasing law" which discourages state agencies from doing business with companies that do business in Burma. M.G.L.A. ch. 7, § 22.[1] Although the federal sanctions targeting Burma make no reference to state and local legislation, the court of appeals held that the federal Burma sanctions preempt the Massachusetts Burma law, and that the Massachusetts Burma law encroaches upon the federal power over foreign affairs and foreign commerce.

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[1] More specifically, the law authorizes the state Operational Services Division to establish a list of companies "doing business with Burma." A state agency may purchase from a company that is on the list only if: (1) the procurement is essential and the restriction would eliminate the only bid or offer, or would result in inadequate competition (*Id.*, § 22H(b); (2) the Commonwealth is purchasing certain medical supplies (*Id.*, § 221); or (3) there is no "comparable low bid or offer" by an unrestricted bidder (*Id.*, § 22H(d)).

The decision of the court of appeals conflicts with this Court's decision in *Barclays Bank* holding that Congress, not the federal courts, has the primary constitutional authority to determine whether to preempt state law based upon foreign commerce and foreign policy considerations. As discussed below, Congress has repeatedly refused to exercise its authority to preempt the Massachusetts Burma law and other state and local selective purchasing laws, and the federal courts should not substitute their judgment for that of Congress on this matter.

I. Congress Has Chosen Not to Preempt the Massachusetts Burma Law and Other Similar State and Local Selective Purchasing Laws

This Court has made it clear that when Congress intends to intrude upon an area of traditional state power—such as the procurement power being exercised under the Massachusetts Burma law—"it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).[2] Congress has not only refused to make any statement (let alone a "clear statement") of intent to preempt state and local selective purchasing laws such as the Massachusetts Burma law, it has repeatedly expressed support for such measures.

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[2] Rather than applying the "clear statement" standard, the court of appeals applied a "strong presumption that [Congress] intended to preempt the field . . . ." Pet. App. at 70. As the Solicitor General has recently noted, this standard "contrasts sharply" with the Ninth Circuit's analysis of the preemption of state laws affecting foreign commerce in *International Association of Tanker Owners v. Locke*, 148 F.3d 1053 (9th Cir. 1998). *See* Reply Brief for the United States, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, United States v. Locke (No. 98-1701). This Court has granted certiorari in that case. 68 USLW 3152 (U.S. Sept. 10, 1999) (No. 98-1701, 98-1706).

The Massachusetts Burma law is part of a tradition of state and local selective purchasing and investment laws, including measures that have restricted business with companies doing business in South Africa, Cuba [3] and Northern Ireland,[4] as well as the recent actions by numerous state and local governments concerning the refusal of Swiss Banks to return the assets of Holocaust victims.[5] Despite the controversy surrounding the measures, Congress has repeatedly and deliberately refused to exercise its authority to preempt them.

Congress first addressed the issue almost fifteen years ago in the context of proposals to preempt state and local selective purchasing laws concerning South Africa. Sen-

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[3] *See, e.g.*, Fla. Stat. Ann. §§ 215.471-472 (West Supp. 1998).

[4] Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw J. Int'l L. & Bus. 563, 568 (1993) ("Fourteen states, including Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, and 34 cities have enacted advisory or mandatory divestment laws directed towards firms that have business relationships with Northern Ireland.")

[5] *See, e.g., Testimony of New York State Comptroller H. Carl McCall before the United States Senate Committee on Banking, Housing, and Urban Affairs* (July 22, 1998) 1998 WL 413309 (F.D.C.H.); *Testimony of Under Secretary of State Stuart E. Eizenstat before the House International Relations Committee* (June 3, 1998) 1998 WL 288972 (F.D.C.H.); *Testimony of William C. Lane, Washington Director of Government Affairs, Caterpillar Inc., on Behalf of USA*Engage, Before the Subcommittee on International Economy Policy, Export and Trade Promotion, Senate Foreign Relations Committee* (Mar. 25, 1998) 1998 WL 169595 (F.D.C.H.); *Testimony for Under Secretary Stuart Eizenstat Before the Trade Subcommittee of the House Ways and Means Committee* (Oct. 23, 1997) 1997 WL 667739 (F.D.C.H.); *Statement of Willard M. Berry, President, European-American Business Council before the House Ways and Means Committee Subcommittee on Trade—"The Use and Effectiveness of Unilateral Trade Sanctions"* (Oct. 23, 1997) 1997 WL 679201. (F.D.C.H.)

ator Roth circulated an amendment to the Anti-Apartheid Act of 1985 that would have preempted state and local measures, but he never introduced the amendment because it faced certain defeat. *See Statement of Senator Edward Kennedy*, 132 Cong. Rec. S23291 (Sept. 15, 1986). The Comprehensive Anti-Apartheid Act of 1986 did not contain any reference to state and local sanctions. In response to an "eleventh hour" claim that the 1986 Act would preempt state and local measures (*id.*), the House of Representatives overwhelmingly passed a resolution stating that it did not intend to preempt such laws. The resolution stated that

> It is not the intent of the House of Representatives that the [federal anti-apartheid law] limit, preempt, or affect, in any fashion, the authority of any state or local government . . . to restrict or otherwise regulate any financial or commercial activity respecting South Africa.

H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986).

The resolution was passed after heated debate concerning the propriety of such state and local measures. *See* 132 Cong. Rec. H6758-03, H6768-05 (Sept. 12, 1986).

Not only did Congress refuse to preempt state and local anti-Apartheid laws, it voted to permit state and local governments to condition the award of contracts for federally funded transportation projects on compliance with these laws. Prior to enactment of the Comprehensive Anti-Apartheid Act of 1986, the Department of Transportation had withheld millions of dollars in federal funds from state and local jurisdictions with selective purchasing laws concerning South Africa on the grounds that these laws violated the requirement that state and local government contracts using federal funds be awarded to the lowest bidder. *See Board of Trustees v. Mayor and*

City Council of Baltimore, 317 Md. 72, 117 n. 45, 562 A.2d 720, 742 n. 45 (1989), *cert. denied*, 493 U.S. 1093 (1990).[6]

Congress responded by including a provision in the Comprehensive Anti-Apartheid Act of 1986 that waived the lowest-bidder requirement as applied to state and local anti-apartheid laws for 90 days. *See* Pub. L. 99-440, Oct. 2, 1986, 100 Stat. 1089, § 606. Three years later, Congress voted to permanently permit federal funds to be used for state and local transportation projects that were subject to South Africa procurement laws. *See* Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, June 30, 1989, 103 Stat. 97 (undesignated paragraph entitled "State and Local Anti-Apartheid Policies"). That provision was repealed in 1993 by the South African Democratic Transition Support Act, which repealed most of the federal sanctions on South Africa in response to that country's movement towards democracy. *See* Pub. L. 103-149, Nov. 23, 1993, 107 Stat. 1503.

Yet despite its determination that the federal sanctions and the waiver of the lowest-bidder requirement for state

[6] In *Board of Trustees*, the Maryland Court of Appeal rejected a challenge to Baltimore City ordinances that required city pension funds to divest their holdings in companies that did business in South Africa. As with the National Foreign Trade Council (NFTC)'s challenge to the Massachusetts Burma law, the plaintiffs in *Board of Trustees* argued that the ordinances violated the federal foreign affairs and commerce powers and were preempted. The court of appeals treatment of these issues in this case conflicts with the Maryland Court of Appeals analysis in *Board of Trustees*. Accordingly, granting the petition for certiorari is appropriate. *See* United States Supreme Court Rule 10(a) (certiorari may be appropriate when "a United States court of appeals has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort . . . .")

and local governments were no longer appropriate, Congress still refused to preempt state and local sanctions. Instead, Congress merely *encouraged* state and local governments (along with participants in private boycotts) to rescind their South Africa measures.[7]

Congress has proven no more willing to preempt the Massachusetts Burma law and the various state and local measures concerning the assets of Holocaust victims. Congress imposed sanctions on Burma in 1996, three months after the Massachusetts law was enacted. The federal sanctions conspicuously fail to mention state and local measures let alone express any intent to preempt them, and no legislation preempting state and local Burma laws has subsequently been introduced. *See Omnibus Consolidated Appropriations Act of 1997*, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 through 3009-167 (§ 570) (1996). This failure to address state and local measures cannot be dismissed as an oversight. In recent years, prompted by the controversy over the state and local measures regarding Burma, Swiss banks and South Africa, Congress has engaged in vigorous debate concerning state and local selective purchasing laws. *See* 145 Cong. Rec. H7368-73 (August 5, 1999); 144 Cong. Rec. E1631-03 (August 7, 1998); 144 Cong. Rec. H7262-02, H7278, H7279, H7280-85 (Aug. 6, 1998).

Similarly, sanctions reform legislation introduced in recent years has not addressed state and local measures. *See* H.R. 1244, 106th Cong., 1st Sess. (1999); S. 757, 106th Cong., 1st Sess. 1999); H.R. 2708, 105th Cong., 2d Sess. (1997); S. 1413, 105th Cong., 1st Sess. (1997).

[7] "The Congress urges all State or local governments and all private entities in the United States that have adopted any restriction on economic interactions with South Africa, or any policy discouraging such interaction, to rescind such restriction or policy." Pub. L. 103-149, Nov. 23, 1993, 107 Stat. 1503 § 4(c)(1).

The omission was intentional. The lead sponsors of the bill in both the House and the Senate have criticized state and local selective purchasing laws such as the Massachusetts Burma law[8]—yet their Sanctions Reform Act fails to address state and local measures.[9] Plaintiff in this action—the National Foreign Trade Council—has been a major supporter of the Sanctions Reform Act and was involved in drafting the legislation. *See Debate on the Sanctions Reform Act*, 144 Cong. Rec. H2342-02, H2344-46 (April 28, 1998). The failure of the Sanctions Reform Act to address state and local selective purchasing laws reflects a recognition that there is no more support in Congress for preempting these laws now than there was in 1993 when Congress refused to preempt state and local South Africa laws.

In addition to the numerous occasions on which Congress has considered and refused to preempt state and local selective purchasing laws, Congress has also specifically precluded *any* private lawsuits such as NFTC's challenge to the Massachusetts Burma law from being brought in connection with World Trade Organization (WTO)

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[8] *See* Hon. Lee H. Hamilton of Indiana, *Introduction of the Sanctions Reform Act, H.R. 2708*, 143 Cong. Rec. E2080 (October 23, 1997):

> . . . roughly 20 States and localities have adopted laws prohibiting government commercial dealings with United States or foreign companies that do business with countries that have poor human rights records. . . . [S]ome of [these] state and local sanctions raise difficult questions concerning the constitutional authority to conduct U.S. trade and foreign policy.

See also 144 Cong. Rec. E1291-03, S1292 (1998) (statement of Rep. Hamilton); 144 Cong. Rec. S8165-01, S8186 (1998) (statement of Sen. Lugar).

[9] *See* 145 Cong. Rec. S3457-01, S3504 (1999) (statement of Sen. Lugar); 143 Cong. Rec. S11964-02, S11999 (1997) (statement of Sen. Lugar).

disputes.[10] This preclusion includes both *direct* assertions of trade agreements as causes of action and *indirect* use of trade complaints in support of constitutional claims based upon Congress's power to regulate foreign commerce.[11] Congress thus anticipated, and acted to preclude, exactly the type of challenge brought by NFTC in this case. Nonetheless, both the district court and the court

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[10] *See* Uruguay Round Agreements Act of 1994 (URAA), P.L. 103-465, § 102; 19 U.S.C. § 3512. Specifically, the URAA: (1) precludes any private cause of action based upon WTO obligations (19 U.S.C. § 3512(c)(1)(A)); (2) reserves to the U.S. government the exclusive right to ask a domestic court to preempt state or local law that violates one of WTO agreements (19 U.S.C. § 3512(e)(1)(B)); and (3) provides a formal process of consultation with states and notice to Congress if the United States decides to take legal action against a state or local government (19 U.S.C. § 3512(b)(2)). *See also* 19 U.S.C. § 3512(c)(2) ("It is the intention of Congress . . . *to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements*") (emphasis added).

[11] *See* Statement of Administrative Action for the Uruguay Round Agreements Act (SAA), reprinted in 1994 U.S.C.C.A.N. 4440, at 20:

> Congress will have "occupied the field" with respect to any cause of action or defense that seeks directly *or indirectly*, the private enforcement of those agreements. That means that private parties may not bring suit or raise defenses:
>
> - directly under those agreements;
> - on the basis of a successful judgment against a state in a suit brought by the Attorney General under the agreement; or
> - *on any other basis, including Congress' Commerce Clause authority.*

(emphasis added) The SAA was drafted by the Executive Branch and approved by Congress. The URAA provides that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application. 19 U.S.C. § 3512(d).

of appeals cited the complaints of the European Union and ASEAN in ruling against the Massachusetts Burma law. *See* Pet. App. at 24-26, 81-82. By relying on the complaints of our trading partners to establish an encroachment upon the federal foreign affairs power, the lower courts thus not only disregarded Congress's *implicit* consent to state and local selective purchasing laws, but also its *explicit* prohibition on actions brought in connection with trade disputes.

The court of appeals' disregard of Congress's decision not to preempt state and local selective purchasing laws conflicts with this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994). In *Barclays Bank,* this Court recognized that the federal courts should not seek to displace the authority of Congress to determine whether and when to preempt state laws on foreign affairs or foreign commerce grounds.

II. Under *Barclays Bank*, the Federal Courts Should Defer to Congress's Constitutional Authority to Determine Whether to Preempt State Law Based Upon Foreign Commerce or Foreign Affairs Considerations

This Court has recently expressed a reluctance to read implicit limitations on state power into the Constitution:

> [I]n view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.

Alden v. Maine, 119 S.Ct. 2240, 2259 (1999), *quoting Nevada v. Hall,* 440 U.S. 410, 425 (1979).

The court of appeals, however, relied heavily on *Zschernig v. Miller*, 389 U.S. 429, 440 (1968), which

held that in addition to the explicit limits on state sovereignty,[12] the Constitution implicitly precludes certain state and local measures that implicate foreign affairs. *See* Pet. App. at 14-41.

Yet since *Zschernig* was decided in 1968, this Court has substantially redefined its position on the separation of powers related to foreign commerce and foreign affairs. Most recently, in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.,* 512 U.S. 298 (1994), the Supreme Court held that Congress, not the courts or the executive branch, is the branch of government primarily responsible for determining whether to preempt state or local law based upon foreign affairs or commerce clause complaints. *See id.* at 327-28.

This Court rejected a claim that California's use of worldwide income reporting for the taxation of multinational corporations violated both the foreign commerce clause and the *Zschernig* foreign affairs doctrine. *See, e.g.,* Petitioner's Brief for Barclays Bank PLC, at 32, 42-43, 1993 WL 639306 (December 15, 1993) (asserting *Zschernig*). Writing for the Court, Justice Ginsburg noted that Congress had repeatedly declined opportunities to preempt the states from using worldwide tax reporting (512 U.S. at 325-27) and indicated that claims that a state law interferes with federal control over foreign commerce and foreign affairs will not invalidate the law when "Congress has focused its attention on th[e] issue, but has refrained from exercising its authority to prohibit state-mandated [measures]." 512 U.S. at 329.

The Court in *Barclays* explicitly stated that Congress *may* "passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uni-

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[12] *See, e.g.*, U.S. Const. art. I, § 10.

formity is essential' . . . ." 512 U.S. at 323 (citation omitted). Justice Scalia noted in his concurring opinion that the majority's decision in *Barclays* "requires no more than legislative inaction to establish that 'Congress implicitly has permitted' the States to impose a particular restriction on foreign commerce [and] restores the power to Congress" to determine whether to preempt state law. 512 U.S. at 332. Although this Court has not yet revisited the issue, Justice Scalia's assessment of the significance of *Barclays* is now widely accepted. Virtually all the commentators who have addressed the issue have concluded that *Barclays* deference to congressional authority either severly limits or effectively overrules *Zschernig*.[13] Louis Henkin, the preeminent authority on foreign affairs law, has similarly questioned *Zschernig's* continued viability. *See* Louis Henkin, FOREIGN AFFAIRS AND THE

[13] *See* Curtis A. Bradley and Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 678 n.23 (1998) ("*Barclays* may have eliminated the remnants of the dormant foreign affairs preemption doctrine announced in *Zschernig*"); Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405, 468 n.247 (1997) (*Barclays* "revers[es] [the] tendency of dormant preemption in *Zschernig*"); Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 865 (1997) (discussing *Barclays* and concluding that "there are reasons to think that *Zschernig's* dormant foreign relations preemption retains little, if any validity"); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 25 (1995) ("*Barclays Bank* proceeds on the principle that Congressional acquiescence in a state practice affecting the commercial aspect of foreign relations is sufficient to validate that practice even if its negative effect on American dealings with other countries is demonstrable"); Brenda S. Beerman, *State Involvement in the Promotion of Export Trade: Is it Time to Rethink the Concept of Federalism as it Pertains to Foreign Relations?* 21 N.C.J. INT'L L. & COM. REG. 187, 197-98 (1995) ("*Barclays Bank* . . . implies that the Court will uphold state practices whenever there are passive indications that Congress has found them to be unobjectionable").

UNITED STATES CONSTITUTION, 165 note (2d ed. 1996) ("One would be bold to predict that [*Zschernig*] has a future life; might it remain on the Supreme Court's pages, a relic of the Cold War?")

The case presented by the plaintiffs in *Barclays* was remarkably similar to the NFTC's challenge to the Massachusetts law. The plaintiffs in *Barclays* "relied heavily on *Zschernig*, the enormous diplomatic controversy provoked by the [state] scheme, amicus filings from foreign nations alleging offense at the [state] law, and a variety of executive pronouncements." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1699-1700 (1997).

In this case, the court of appeals similarly relied on criticisms of the Massachusetts law by foreign governments. Pet. App. at 24-27. Yet this Court in *Barclays* emphatically rejected the argument that the complaints of foreign governments were relevant in determining the constitutionality of a state law:

> Barclays' and its amici's argument that California's worldwide combined reporting requirement is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum. The judiciary is not vested with power to decide "how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the states tax as they please."

Barclays Bank, 512 U.S. at 327-28.

The court of appeals in this case has construed *Zschernig* as providing authority for it to engage in just such a subjective policy decision in order to determine whether state or local legislation has an impermissible impact on foreign affairs. *See* Pet. App. at 23 (identifying five

factors that the court of appeals relied on in deciding that the Massachusetts law unduly affected foreign relations.) The court of appeals declined to find that *Barclays* rather than *Zschernig* was controlling, noting that any determination that the decision that *Zschernig* had been either limited or overruled should be made by this Court and not the lower federal courts.

CONCLUSION

Congress has consistently refused to preempt state and local selective purchasing laws, including the Massachusetts Burma law. The members of Congress submitting this brief urge this Court to accept Massachusetts' petition for certiorari in order to clarify the impact of *Barclays* on *Zschernig* and preserve the constitutional prerogative of Congress to determine whether to preempt state law on foreign commerce or foreign affairs grounds.

Accordingly, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

JOHN ECHEVERRIA
Counsel of Record
ROBERT STUMBERG
MATTHEW C. PORTERFIELD
THE HARRISON INSTITUTE
FOR PUBLIC LAW
GEORGETOWN UNIVERSITY
LAW CENTER
111 F Street, N.W.
Suite 102
Washington, D.C. 20001-2095
(202) 662-9603

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IN THE
Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF NONPROFIT ORGANIZATIONS, AMICI CURIAE: CENTER FOR CONSTITUTIONAL RIGHTS, CENTER FOR INT'L ENVIRONMENTAL LAW, CONSUMERS CHOICE COUNCIL, GLOBAL EXCHANGE, HUMANE SOCIETY OF THE U.S., LOS ANGELES BURMA FORUM, NEW ENGLAND BURMA ROUNDTABLE, SUSTAINABLE AMERICA, UNITARIAN UNIVERSALIST SERVICE COMM., WOMEN'S DIV.—GEN. BD. OF GLOBAL MINISTRIES—UNITED METHODIST CHURCH,

(Listing Continued on Inside Cover)

IN SUPPORT OF THE PETITION

DEBORAH ANKER
Counsel of Record
HARVARD IMMIGRATION & REFUGEE CLINIC
197 Friend Street - Suite 800
Boston, MA 02114
(617) 371-1234

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

ALLIANCE FOR DEMOCRACY, AMERICAN LANDS ALLIANCE, ARISE RESOURCE CENTER, ASIA PACIFIC CENTER FOR PEACE & JUSTICE, AS YOU SOW FOUNDATION, BOSTON MOBILIZATION FOR SURVIVAL, CENTER FOR LABOR & COMMUNITY RESOURCES, DEFENDERS OF WILDLIFE, DELTA COUNTY ALLIANCE FOR DEMOCRACY, DICTATOR WATCH, DOMINICAN SISTERS OF HOPE, EARTHRIGHTS INTL., EAST TIMOR ACTION NETWORKS/U.S., EDMONDS INST., 8TH DAY CENTER FOR JUSTICE, FREE BURMA COALITION, FREE BURMA—NO PETRO DOLLARS, HUMANE SOCIETY INTL., INST. FOR AGRICULTURE & TRADE POLICY, INTERNATIONAL COMMITTEE OF LAWYERS FOR TIBET, INTL. LABOR RIGHTS FUND, INTL. RIVERS NETWORK, LONG ISLAND PROGRESSIVE COALITION, JEWISH LABOR COMMITTEE, MERRIMACK VALLEY PEOPLE FOR PEACE, NATIONAL ASSOCIATION FOR SOCIALLY RESPONSIBLE ORGANIZATIONS, PENNSYLVANIA CONSUMER ACTION NETWORK, PHILADELPHIA BURMA FORUM, PROJECT MAJE, PROJECT UNDERGROUND, RT. REV. THOMAS SHAW, EPISCOPAL BISHOP OF MASSACHUSETTS, RUCKUS SOCIETY, SEATTLE BURMA ROUNDTABLE, UNITED FOR A FAIR ECONOMY, URSULINE SISTERS OF TILDONK, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE & FREEDOM

QUESTIONS PRESENTED

Did the Court of Appeals err in failing to consider the importance of international human rights law and principles as authority for the states to adopt a selective purchasing scheme? Did the Court err in overlooking the broad impact on state laws and long standing practices dating back to the slave trade?

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STATEMENT OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Amicus curiae are engaged in aspects of advocacy for human rights, labor rights, and environmental justice in Burma and elsewhere, which are threatened by the decision of the Court of Appeals.* They include religious and voluntary organizations with over ten million members active at the local, state, national and international levels. The parties are concerned with the issues raised by this case regarding the legal authority of states to use selective purchasing to fulfill obligations of international law and to meet the demands of public morality reflected in international human rights principles. Specifically, *amici curiae* are concerned that the Court of Appeals failed to properly consider international human rights obligations, and the effect of the decision on a broad range of state and local activities in which *amici* have interests.

Amici curiae have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Counsel to the respondent, National Foreign Trade Council, has given their consent to the filing of this *amicus* brief.

REASONS FOR GRANTING THE WRIT

I. THE RIGHT OF STATES TO LEGISLATE IN ACCORDANCE WITH U.S. OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW IS AN IMPORTANT MATTER OF FEDERAL LAW WHICH IS UNDERMINED BY THE DECISION OF THE COURT OF APPEALS

The Supreme Court should grant certiorari because this case involves significant international human rights

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* As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of this brief. Funding for preparation of this brief was provided through the institutional support of Harvard Law School Human Rights Program, which is a program for research and clinical legal education.

obligations that were completely discounted by the court below. The Court of Appeals failed to consider the importance of these obligations, only taking cognizance of certain disputed obligations under international trade law. As a result, the ruling of the Court will have a disruptive effect on a legitimate basis of state legislative authority. Further, by giving short shrift to the violations of human rights in Burma, the Court neglected the essential link between the law and the state's legislative authority.

International human rights law enables state legislative authority on three grounds. First, states have sovereign powers to legislate for the protection of public morality, of which human rights forms a part (*see* § B, *infra.*). Second, as adopted into U.S. law through Senate ratification, states have an explictly recognized role in the implementation of laws (*see* § C, *infra*); and third, to the extent it is customary international law, international human rights law (IHRL) is incorporated into federal common law providing separate grounds for state legislative jurisdiction (*see* § D, *infra.*). In its decision, the Court of Appeals dismissed these considerations, improperly emphasizing one component of international obligations and ignoring the body of IHRL (*see* § E, *infra*).

A. International Treaties to Which the United States Is a Party Create Binding Obligations Acknowledged in U.S. Law to Act Affirmatively to Promote Respect for Human Rights

The constitutive documents of international human rights law (IHRL) commit the United States to promote universal human rights and to take measures to suppress egregious violations of human rights. Articles 55 and 56 of the U.N. Charter require members of the U.N. to "take joint and separate action" for the achievement of "universal respect for and observance of, human rights and fundamental freedoms for all . . .". United Nations

Charter, arts. 55, 56 Stat. 1031, T.S. 993, *entered into force,* Oct. 4, 1945. Moreover, the Universal Declaration of Human Rights (UDHR), the cornerstone of IHRL, calls on member states to take "progressive measures, national and international, to secure universal and effective recognition and observance [of human rights] . . .". Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Finally, the constitutive documents of the International Labor Organization (ILO) require member states to implement policies to bring about universal respect for basic rights, affirming that "all national and international policies and measures, in particular those of an economic and financial character" are acceptable "only in so far as they may be held to promote and not to hinder" social justice. Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the Instrument for the Amendment of the Constitution of ILO Constitution, *entered into force* April 20, 1948, *re-entered into force for the United States,* Feb. 18, 1980, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 104.

International treaties prohibiting slavery and slave-like conditions, including forced labor and torture, clearly indicate that enforcement of human rights is the concrete obligation of every signatory or member, not simply a diffuse commitment of international organizations. In ratifying these treaties, the U.S. has committed itself to the eradication of such violations practiced in Burma.

Thus, for example, ILO Convention (No. 105) Concerning the Abolition of Forced Labor outlaws forced or compulsory labor in five specific circumstances, which have been violated by the Burmese military regime. (ILO 105, *entered into force,* Jan. 10, 1957, 320 U.N.T.S. 291, *ratified* May 14, 1991.) Among them:

> Each Member of the ILO which ratifies this Convention undertakes to suppress and not to make use of any form of compulsory labour . . .
>
> (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
>
> (b) as a method of mobilising and using labour for purposes of economic development;
>
> (c) as a means of labour discipline . . . .

(Art. 1). Comments made by senators in support of the ILO Convention indicate an acknowledgment of an implicit extraterritorial purpose. In arguing for passage of ILO Convention No. 105 in 1967, former Supreme Court Justice and Ambassador Arthur Goldberg reasoned, "[w]hen countries are permitted to use forced labor to produce goods and services, that, of course, places our own country at a great competitive disadvantage." (Hearing of the Ad Hoc Subcommittee on Human Rights Conventions, of the Committee of Foreign Relations, Feb. 23, 1967.) Prior to Senate ratification in 1991, the chair of the Senate Foreign Relations Committee, Jesse Helms, explained that the ILO Convention authorizes policy measures to suppress forced labor outside of the territory of the United States. (137 Cong. Rec. S5728, 102nd Cong., 1st Sess. (1991) (statement of Sen. Helms).

The Convention Against Torture (CAT) also requires States Parties to take measures to prohibit acts of torture and cruel, inhuman or degrading treatment or punishment *at home or abroad*. It explicitly requires states to punish torturers (or extradite them to a state that will do so) no matter what the country of origin. (Art. 4, CAT, S. Treaty Doc. No. 100-20, 102nd Cong., 2d Sess. v-vi (1988), G.A. res. 39/46, annex, 39 U.N. GAOR

Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force*, June 26, 1987, *ratified* 1992).

Recognizing these obligations, Congress codified the observance of human rights as a principal goal of foreign policy:

> The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations . . ., promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . . Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

22 U.S.C. § 2304(a)(1).

B. States of the United States Have Sovereign Authority to Condition Public Spending on International Human Rights Principles as an Aspect of Their Right to Legislate for Public Morality

In contrast to the enumerated powers of the federal government, the powers of states are plenary. *See, e.g., Maro Saldana v. Wyoming*, 846 P.2d 604, 646 (Wyo. 1993). States may use their purchasing power to advance social goals, which include limiting state business to market actors that comport with standards of integrity and public morality. *Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1971). This authority is recognized as an exception to commerce clause limits on state powers when the state acts as a "guardian and trustee" of taxpayer resources. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438, 441 (1980).

One important measure of public morality is IHRL, defining a body of international standards binding the United States. It constitutes "those benefits deemed essential for individual well-being, dignity and fulfillment and

. . . a common sense of justice, fairness, and decency." Louis Henkin, The Age of Rights 2 (1996). It is clear that standards of public morality may be contravened by international trade that brings products made under morally abhorrent circumstances into the state of Massachusetts, displacing other products and enabling repressive governments to continue to violate rights with impunity. Under the Court of Appeals decision, Massachusetts might exclude products of local labor or rights abusers from state purchase, but would be forced to purchase products created under patently worse conditions abroad. Massachusetts citizens must be allowed to choose whether their purchasing dollars should support slave labor conditions in Burma, just as they choose to exclude local producers who fail to meet local standards of integrity and public morality.

Such a standard is clearly offended by the human rights abuses of the current government in Burma. For more than ten years, the Burmese military regime has consistently committed gross human rights violations. The government "killed thousands of civilians in seizing power, and has since killed, tortured, raped, imprisoned and forcibly relocated hundreds of thousands of Burmese people." Amnesty International, "Myanmar: 10th Anniversary of Military Repression," (August 7, 1998). U.S. government, UN and ILO reports document continuing violations including forced labor, suppression of a democratically elected government, and suppression of individual political rights. *See* U.S. State Department Report to Congress (June 13, 1997) 104-106; Appendix, 490-492.

Doing business in Burma inescapably supports the ability of the Burmese military regime to maintain this abuse of human rights. Most sectors of the economy depend upon an infrastructure that has been built with forced

labor. *See* U.S. Department of Labor, *Report on Labor Practices in Burma* (Sept. 1998) at 4. International commeree with companies owned or controlled by the Burmese military regime, direct business relations with the regime, and virtually all trade with Burma contribute to the continuation of human rights violations by providing support for the government's balance of payments, which is directly connected with military expenditures by the Burmese military regime for purposes of domestic suppression. *See* U.S. Embassy, Rangoon, *Foreign Economic Trends Report—Burma* (1997) at 15-16. The Massachusetts Burma Law is a legitimate response to the connection between doing business in Burma and the ability of the Burmese military regime to commit human rights violations.

C. International Human Rights Conventions, Adopted Into U.S. Law by Ratification, Reserve Substantial Responsibility for Enforcement of Human Rights Norms to the States

The United States has reserved large segments of international human rights enforcement to the states. Cognizant of the goals of the IHRL conventions and their place in fulfilling the purpose of the United Nations and the ILO, Congress has knowingly granted authority to the states to act with extraterritorial effect.

To this end, Congress has ratified Convention No. 105 on Forced Labor, the CAT, and the International Covenant on Civil and Political Rights (ICCPR). Within each of these conventions, not only has Congress committed itself to a long standing obligation to suppress slavery and forced labor, it has explicitly reserved to the states an enforcement role.

The Constitution of the ILO (Art. 19.7), overseeing Convention No. 105 on Forced Labor (instructing mem-

ber States to suppress and not to make any use of forced or compulsory labor like that currently practiced in Burma), contains a federalism clause that defers to the authority of subnational governments, including states. Constitution of the International Labour Organization, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, *amended by* 7 U.S.T. 245, T.I.A.S. No. 3500, 191 U.N.T.S. 143 (1953), 14 U.S.T. 1039, T.I.A.S. No. 5041, 466 U.N.T.S. (1962), U.S.T. 3253, T.I.A.S. No. 7987 (1972). The role of the states in the application of conventions is also important.[1]

A federalist reservation was included when the U.S. Senate ratified both the CAT (prohibiting acts of torture and cruel, inhuman or degrading treatment or punishment *at home or abroad*) and the ICCPR (obligating signatories to respect and ensure the enumerated rights to all individuals without regard to status and to adopt legislation to put into effect these rights and their remedies). The ICCPR reservation on federalism (similar to that adopted for the CAT) states:

> That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments.

Understanding No. 5, 138 Cong. Rec. S4784 (1992).

[1] U.S. Representative to the ILO, Philip M. Kaiser, explained the meaning of the ILO Constitution's federalism clause:

> Where, in a country with a federal government like our own, it is decided that the subject of a convention comes under the jurisdiction of the constituent states *as well as* the federal authority, that particular convention is treated like a recommendation. It is referred to the states for such action as they care to take . . . .

Hearing, Subcommittee on Labor and Public Welfare on S.J. Res. 117, 84th Cong., 2d Sess. (1956) (Statement of Asst. Secretary of Labor Philip M. Kaiser).

Clearly, the obligation to implement these two conventions, one to suppress torture and forced labor, the other to enforce protection of basic human rights, was explicitly left in part to the states.

D. Customary International Law (CIL), as Part of the Federal Common Law, Provides Further Authority for State Legislation Intended to Promote Universal Respect for Human Rights and Suppress Its Violations

Since 1900, it has been accepted that CIL forms an integral part of U.S. law. *The Paquete Habana*, 175 U.S. 677 (1900). This Court approved the inclusion of CIL within the definition of the law of nations, stating that CIL should be used by courts:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. *Id.* at 700.

The American Law Institute's Third Restatement of Foreign Relations Law (Restatement), explains that CIL "results from a general and consistent practice of states followed by them from a sense of obligation" and is also created by international agreements "when such agreements are intended for adherence by states generally". Restatement (Third) of Foreign Relations Law § 102 (1987).

Violations of CIL as applied in the United States include "slavery or slave trade," "torture or other cruel, inhuman or degrading treatment or punishment," and "a consistent pattern of gross violations of internationally

recognized human rights." Restatement (Third) of Foreign Relations Law § 102 (1987). All of these violations have been documented in Burma, and are legitimated and supported by continued U.S. economic involvement with the illegitimate ruling regime. Thus, the United States has a *duty* to respond to these violations of CIL by appropriate means including shaping "its trade, aid or other national policies so as to dissociate itself from the violating state or to influence that state to discontinue the violations". Restatement (Third) of Foreign Relations Law § 702, cmt. o (1987).

It is perfectly legitimate for a state to act upon CIL as translated into U.S. law. As CIL develops, it becomes part of federal common law. In *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995), the court states that "it is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law." *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (citing *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *Trajano v. Marcos* (Marcos Estate I), 978 F.2d 493, 502 (9th Cir.), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

Accordingly, states may legislate in a manner consistent with federal common law. Indeed, in other contexts, including ERISA and labor law, courts have relied on state law to inform and interpret federal common law. *Negoski v. Country Life Ins. Co.*, 843 F.Supp. 372 (N.D. Ill. 1993). *See also Fox Valley and Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.), *cert. denied*, 498 U.S. 820 (1990); *Nash v. Trustees of Boston University*, 946 F.2d 960 (1st Cir. 1991) (*citing*

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957)). The court's deference to state law is particularly significant given the federal preemption present in both ERISA and labor law. Thus, as the Massachusetts Burma statute is consistent with CIL and federal common law, it should be viewed as contributing to, rather than contradicting, federal law.

E. The First Circuit Court of Appeals Was Unduly Influenced by the European Union in Its Consideration of International Law; a Full Consideration of U.S. Obligations Cannot Be Limited to One Treaty

The First Circuit Court of Appeals cited the opinion of a European Union official that the Massachusetts Burma Law is "an attack on international law." However, the "international law" referred to, the World Trade Organization (WTO) Government Procurement Agreement, is but one component of a complex and well-developed body of law. Further, WTO implementing legislation unambiguously prohibits private causes of action such as the National Foreign Trade Council (NFTC) challenge to the Massachusetts Burma Law that are related to the alleged inconsistency of a state law with WTO rules. Uruguay Round Agreements Act of 1994 (URAA). P.L. 103-465, § 102; 19 U.S.C. § 3512.

As argued in Section A, *supra*, if considered within the context of a complete collection of instruments that comprise IHRL, the Court should find U.S. obligations broad and inclusive. These instruments require all levels of the U.S. government to respect and protect the rights enumerated therein.

II. THE COURT OF APPEALS' DECISION UNDERMINES TRADITION OF STATES' INVOLVEMENT IN LEGISLATING TO PROMOTE HUMAN RIGHTS, DATING BACK TO STATE PROHIBITION OF THE SLAVE TRADE

The Decision of the Court of Appeals undermines a long tradition of state activism at the juncture of international trade and human rights. From the abolition of the slave trade to apartheid in South Africa, a rich tradition of state activism has helped give voice to citizen concern and indeed, shaped domestic and foreign policy. When the drafters of the Constitution agreed to bar federal legislation to ban the slave trade (until 1808), there was no implication that states would have to follow suit. U.S. CONST. art. I, § 9, cl.1. In fact, the authors of the Federalist Papers pleaded with the states to take action during that period. Despite the absence of federal legislation, the practice of slavery "may be totally abolished," wrote James Madison, "by a concurrence of the Few States which continue the unnatural traffic, in the prohibitory example which has been given so great a majority of the Union." THE FEDERALIST 43 (James Madison).

Economic boycotts have been a traditional method adopted by states and municipalities to convey the sentiments of the population since the Boston Tea Party. *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287 (citing colonial boycotts used to oppose British rule); Charles McLean Andrews, *The Boston Merchants and the Non-importation Movement* (1968). *See further* Briefs for Petitioner, *NAACP v. Claibourne Hardware Co.*, 458 U.S. 886 (1982) (describing boycotts as historically significant), *as cited in* Matthew Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l Law at 41 (1999).

This tradition of activism on the local and state level continues as a hallmark of American political involvement. As the Court of Appeals notes, at least 19 municipal governments have enacted analogous laws restricting purchases from companies that do business in Burma. Other jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, and other nations. *National Foreign Trade Council v. Andrew S. Natsios et al.*, 181 F.3d 38, 47 (1st Cir., June 22, 1999).

State procurement limits or divestment have been adopted to influence other foreign issues, including perceived employment discrimination against the Catholic minority in primarily Protestant Northern Ireland. Fourteen states, including Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, and 34 cities have enacted advisory or mandatory divestment laws directed towards firms that have business relationships with Northern Ireland. Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw. J. Int'l L. & Bus. 563, 568-569 (Spring 1993).

Indeed, Massachusetts approved a restriction on investment in firms that sell weapons or munitions that are used in Northern Ireland. An Act Terminating the Investment of Public Pension Funds in Firms Contributing to the Oppression in Northern Ireland, Mass. Gen. Laws, Ann. Ch. 32, § 23(1)(d)(iii), *approved* April 4, 1983.

Divestment in South Africa was spearheaded by state and local jurisdictions for nearly two decades in express disagreement with the stated federal policy of constructive engagement. In the end, however, it culminated in the federal Comprehensive Anti-Apartheid Act of 1986. By the fall of 1985, divestment bills had been enacted by 19 states and 62 cities and counties. Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State*

and Local Divestment Legislation, 61 Tul. L. Rev. 469, 471-472 (February 1987).

Placing these issues within a constitutional framework, Professor Laurence Tribe of Harvard Law School addressed the U.S. Senate on this matter, stating that although U.S. foreign policy is constitutionally reserved to the federal government, "it is equally fundamental that states and their public subdivisions are assigned the responsibility, under our Constitution, of deciding where and how to invest the public resources they collect through taxing and other sovereign measures." Absent a Congressional choice to "displace this historically localized responsibility" of states, Tribe explains, "[T]here is nothing in federal constitutional law that could conceivably support taking from state legislatures and municipal authorities this basic control over their own economic destinies." 132 Cong. Rec. S12533, *supra*.

III. THE COURT OF APPEALS DECISION PLACES THE CONSTITUTIONALITY OF MANY STATE AND LOCAL LAWS IN DOUBT, AND MAY LEAD TO A DRAMATIC INCREASE IN INAPPROPRIATE LEGAL CHALLENGES

A. The Court of Appeals Decision That Selective Purchasing Laws Are Unconstitutional Is an Important Question of Federal Law Because of the Large Number of State and Local Selective Purchasing Laws That Could Be Affected

The Court of Appeals decision could result in commerce clause and foreign affairs challenges to a wide variety of state and local procurement laws. This is because the First Circuit rejected the Massachusetts assertion that the Burma Law involves the state's power to act as a market participant, rather than as a market regulator, and thus is not subject to the limitations of the foreign commerce clause or the federal foreign affairs power. *See*

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit ("Pet. App.") at 36-38, 48-50.

As the Court of Appeals noted, many jurisdictions have selective purchasing laws similar to the Massachusetts law that restrict their procurement of goods and services from companies that do business in countries that suppress democracy and violate human rights. *See* Pet. App. at 10. In addition to procurement measures intended to express support for democracy and human rights, numerous municipalities and 48 states have adopted at least one environmental procurement preference that could be challenged under the Court of Appeals' reasoning.[2] The 48 state environmental purchasing preferences include: 34 states with preferences for recycled materials generally,[3] 20

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[2] As with the Massachusetts Burma law, foreign governments have suggested that environmental procurement preferences constitute trade barriers. *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 2 and 18-19 (Brussels, Oct. 1998); Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 14 (Ottawa, Jan. 1999); Ministry of International Trade & Investment, 1998 REPORT ON THE WTO CONSISTENCY OF TRADE POLICIES BY MAJOR TRADING PARTNERS (Japan 1998).

[3] Alaska Stat. § 36.30.337 (Michie 1998); Cal. Pub. Cont. Code § 12310 (West 1998); Del. Exec. Order 82 (1990); Fla. Stat. Ann. § 287.045 (West 1998); Haw. Rev. Stat. § 103D-1005 (1997); 415 Ill. Comp. Stat. 20/3 (West 1998); Ind. Code § 5-22-15-16 (Michie 1998); Iowa Code Ann. § 216B.3 (West 1997); Kan. Stat. Ann. § 75-3740b (1997); Ky. Rev. Stat. Ann. § 45A.520 (Banks-Baldwin 1998); La. Rev. Stat. Ann. § 30:2415 (West 1998); Me. Rev. Stat. Ann. tit. 5, § 1812 (West 1997) (recycled materials other than paper); Md. Code Ann., State Fin. & Proc. § 14-402 (1998); Minn. Stat. Ann. § 16B.121 (West 1998); Miss. Code Ann., § 49-31-7 (1998); Mo. Ann. Stat. § 34.031 (West 1997) (recycled solid waste materials); Mont. Code Ann. § 75-10-806 (1997); Neb. Rev. St. § 81-15,159 (Michie 1998); Nev. Rev. Stat. § 386.417 (1997); N.H. Rev. Stat. Ann. § 21-I:11 (1997); NM. Stat. Ann. § 13-I-135.1 (Michie 1998); N.Y. Pub Auth. Law § 2878-a (McKinney 1998);

states with separate purchasing preferences for recycled paper,[4] and several addressing other recycled materials.[5] Many local governments have also adopted procurement policies for products with recycled content, ranging from paper[6] to street signs[7] to playgrounds to park benches

N.C. Gen. Stat. § 130A-309.14 (1997); Ohio Rev. Code Ann. § 125.082 (West 1998); Okla. Stat. Ann. tit. 74, § 85.53 (West 1998); Or. Rev. Stat. § 279.570 (1997); R.I. Gen. Laws § 37-2-76 (1997); S.C. Code Ann. § 44-96-140 (1997) (recycled and recyclable materials); S.D. Codified Laws § 5-23-41 (Michie 1998); Tex. Health & Safety Code § 361.426 (West 1998); Vt. Stat. Ann. tit. 3, App. Ch. 7, Exec. Order 24-86 (recycled materials and nonwasteful packaging); Wash. Rev. Code Ann. § 43.19.A.005 (West 1998) W. Va. Code § 20-11-7 (1998); Wis. Stat. Ann. § 16.72 (1998).

[4] Alaska Stat. § 36.30.333 (Michie 1998); Ariz. Rev. Stat. Ann. § 41-2533 (West 1998); Ark. Code Ann. § 19-11-260 (Michie 1998); Cal. Pub. Cont. Code § 12162 (West 1998); Cal. Educ. Code § 32373 (West 1999) (educational agencies); Colo. Rev. Stat. Ann. § 24-103-207 (West 1998); Conn. Gen. Stat. Ann. § 4a-67a (West 1998); Ga. Code Ann. § 50-5-60.2 (Michie 1998); Me. Rev. Stat. Ann. tit. 5, § 1812-B (West 1997); Mass. Gen. Laws Ann. ch. 7 § 22 (West 1998); Mich. Comp. Laws Ann. § 18.1261b (West 1998); Minn. Stat. Ann. § 16B.122 (West 1998); N.J. Stat Ann. § 13:1E-99.27 (1998); N.D. Cent. Code § 54-44.4-08 (1997); Or. Rev. Stat. § 279.630 (1997) (recycled and recyclable); 53 Pa. Cons. Stat. § 4000.1511 (1999); S.D. Codified Laws 5-23-22.4 (Michie 1998); Tenn. Code Ann. § 68-211-606 (1998); Tex. Gov't Code Ann. § 2155.446 (West 1998); Utah Code Ann. § 63-56-20.7; Va. Code Ann. § 11-47.2.

[5] *E.g.*, Colo. Rev. Stat. Ann. § 8-19.5-101 (West 1998) (plastics); Conn. Gen. Stat. Ann. § 4b-51a (West 1998) (construction materials); Idaho Code § 40-707 (1998) (highway construction and maintenance); 58 Pa. Cons. Stat. § 479 (1999) (oil products); Tex. Gov't Code Ann., § 2155.447 (West 1998) (oil products).

[6] *E.g.*, D.C. Code Ann. § 6-3413 (1998); N.Y.C. Admin. Code § 6-122 (1998); City of Richmond Code (Virginia) § 22-4 (1993).

[7] Columbus, Ohio has an ordinance requiring street signs to be made from recycled materials. Eleanor Lewis & Eric Weltman, *Government Buying Can Save Tax Dollars and the Environment*, Int'l City-County Mgmt. Ass'n, Feb. 1993, at 2.

and fences,[8] to ordinances creating a general preference for recycled materials.[9] Other environmental procurement measures at the state and local level aim to reduce dependence on petroleum-based products. These include nine states with price preferences for soybean-based ink,[10] five states with statutes requiring bio-based or clean alternative fuel for governmental motorized vehicles,[11] and a variety of statutes and ordinances requiring energy efficiency to be taken into account in procurement decisions.[12]

[8] Chicago recently adopted an ordinance with a purchasing preference for playgrounds, park benches and fences made from recycled plastic. Alice Horrigan, *Choosing to Recycle—Because it Pays*, E, Mar. 13, 1997.

[9] *E.g.*, Baltimore County Code § 15-91 (1988); Itasca County, Minnesota, *see* Lewis & Weltman, *supra*, King County, Washington, *see* Richard Keller, *Buying Recycled: Investing Dollars to Close the Loop*, World Wastes, Jan. 1994; City of Los Angeles Admin. Code, art. 6, § 10.32 (1998); Newark, New Jersey, *see* Lewis & Weltman, *supra*.

[10] Ark. Code Ann. § 19-11-102 (Michie 1998); 30 Ill. Comp. Stat. 500/45-15 (West 1998); 50 Ill. Comp. Stat. 520/10 (West 1998) (local government purchases and contracts); Ind. Code § 5-22-15-18 (1998); Iowa Code Ann. § 216B.3 (West 1998); Ky. Rev. Stat. Ann. § 57.035 (Banks-Baldwin 1997); Minn. Stat. Ann. § 16B.121 (West 1998); Mo. Ann. Stat. § 34.175 (West 1997); N.D. Cent. Code § 54-44.4-07 (1997); S.D. Codified Laws § 5-23-37 (Michie 1998). Iowa also has a preference for soybean-based hydraulic fluids. Iowa Code Ann. § 307.21 (West 1998).

[11] Cal. Eduuc. Code § 17911.5 (West 1998) (clean fuel school buses); Conn. Gen. Stat. Ann. § 4a-59 (West 1998) (clean alternative fuel); Ind. Code § 5-22-15-19 (1998) (soy diesel, bio-diesel); Iowa Code Ann. § 18.18 (West 1997) (minimum ethanol requirements and alternative methods of propulsion); Wash. Rev. Code Ann. § 43.19.637 (West 1998) (clean fuel motorized vehicles).

[12] The statutes include Ariz. Rev. Stat. Ann. § 34-455 (buildings) (West 1998); Conn. Gen. Stat. Ann. § 16a-38 (West 1998) (lifecycle cost analyses in major capital projects); Minn. Stat. Ann. § 216C.19 (West 1998) (roadway lighting; N.H. Rev. Stat. Ann. § 21-I:19-a (1997) (buildings); Or. Rev. Stat. § 276.915 (1997); Tex. Gov't Code Ann. § 2166.403 (1999); Vt. Stat. Ann. tit. 3 § 2291

Another type of state and local environmental procurement policy is a limit on tropical hardwood purchases. To date, three states and nine cities have passed laws that limit the purchase of wood from tropical rainforests, only buying tropical timber that is harvested using ecologically sound management practices.[13]

In addition to environmental objectives, local governments have also used their purchasing power to promote fair labor practices. Dozens of cities and counties—including Pittsburgh, Cleveland, and San Francisco—have laws banning the procurement of products made in sweatshops.[14] Similarly, nearly two dozen cities require com-

(1998); Wis. Stat. § 16.847 (1998). New York City requires government purchases of motor vehicles to be low emissions vehicles. N.Y.C. Admin. Code § 6-121 (1998). Auustin, Texas has a purchasing preference for solar electric systems, *see* Lewis & Weltman, *supra*, while San Jose, CA requires streetlights to be energy efficient, and Phoenix, Arizona requires energy efficiency in all municipal building lighting, *see id.*

[13] Ariz. Rev. Stat. Ann. § 34-201 (West 1998); N.Y. State Fin. Law § 165 (McKinney 1998); Tenn. Code Ann. § 4-3-1112 (1998); Baltimore, Maryland, Ord. No. 635 (passed 1991), *see* John Javna, *Now let's remind your rep: Rally behind recycling bill*, Atlanta J. and Atlanta Const. Mar. 24, 1991, *available in* 1991 WL 7779914; Bellingham, Washington, Resolution No. 43-90 (passed Aug. 1990); Berkeley, California (tropical hardwoods, redwoods) (Renee Koury, *Endangered Timber Banned in Berkeley*, L.A. Daily News, Oct. 30, 1995, *available in* 1995 WL 5424835); Los Angeles, California, *see* Tracey Kaplan, *Children Get City to Bar Hardwoods*, L.A. Times, Oct. 9, 1991 *available in* 1991 WL 2221464; Long Beach, California, *see* "Tropical Timber Trade Restrictions," Rainforest Relief (Jan. 27, 1999 facsimile); San Francisco, Ordinance No. 391-90; Santa Clarita, California, *see* Kaplan, *supra*; Santa Monica (California) Mun. Code, ch. 2.28; Ventura, California, *see* Tina Daunt, *Ventura City Hall Joins Boycott of Hardwoods*, L.A. Times, Mar. 17, 1992, *available in* 1992 WL 2937933.

[14] *See* U.S. Newswire, *Pittsburgh Joins City Fight Against Sweatshops* (Sept. 23, 1998); Linda Himelstein, *Going Beyond City Limits? Municipalities Are Exercising Their Clout on Social Issues —And Business Is Balking*, Bus. Wk. (July 7, 1997).

panies receiving municipal contracts to pay their employees a "living wage."[15] All of these laws could be subject to challenge based upon the Court of Appeals' ruling that market participation measures are subject to the self-executing limits of the federal foreign affairs power and the foreign commerce clause.

B. The Court of Appeals' Reliance on the Complaints of Foreign Countries Presents an Important Question of Federal Law Because Foreign Countries Have Complained That a Wide Variety of State and Local Laws Constitute Trade Barriers

In addition to threatening state procurement laws, the Court of Appeals' reliance on complaints by foreign governments could provoke challenges to various other types of state law. The European Union (EU) has argued that numerous kinds of state law constitute trade barriers, including subsidies,[16] health and safety standards,[17] environmental standards[18] and taxation of multinational corporate income.[19] Based on EU trade reports and the World Trade Organization (WTO) provisions that they cite, a 1994 study identified 90 potential conflicts between WTO provisions and state law in California alone.[20] Canada has similarly complained about various categories of state law including state-level inspection requirements for goods

[15] Yumi Wilson, *S.F. Sets Up 15-Member Panel to Study Effect of Living-Wage Law*, S.F. Chron. A23 (Nov. 24, 1998) available at 1998 WL 3928728.

[16] *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 23 (Brussels, Oct. 1998).

[17] *Id.* at 11.

[18] *Id.*

[19] *Id.* at 5.

[20] *See* Robert Stumberg, GATT IMPACT ON STATE LAW: CALIFORNIA (Center for Policy Alternatives, 1994).

and food safety,[21] licensing and taxation of alcoholic beverages,[22] and newsprint recycling requirements.[23]

Congress anticipated that state laws could be challenged as conflicting with trade agreements, and it specifically prohibited any party from asserting a private cause of action based upon such alleged conflicts. *See* Pet. App. at 26, *citing* 19 U.S.C. § 3512. Accordingly, the decision of the Court of Appeals should be reversed in order to prevent litigation challenging state laws on the grounds that they encroach upon federal power to regulate foreign affairs or foreign commerce because the laws are inconsistent with WTO trade agreements.

CONCLUSION

This Court should grant petitioner's writ of certiorari in order to affirm the rights of states to legislate in accordance with international human rights law and principles, and alleviate the uncertainties about existing laws and regulations created by the Appeals Court's decision.

Respectfully submitted,

DEBORAH ANKER
Counsel of Record
HARVARD IMMIGRATION &
REFUGEE CLINIC
197 Friend Street - Suite 800
Boston, MA 02114
(617) 371-1234

On the Brief,
PETER ROSENBLUM

October 20, 1999

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21 *See* Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 13 (Ottawa, Jan. 1999).

22 *Id.* at 15.

23 *Id.*

No. 99-474

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICI CURIAE OF CHAMBER OF COMMERCE OF THE UNITED STATES, ORGANIZATION FOR INTERNATIONAL INVESTMENT, NATIONAL ASSOCIATION OF MANUFACTURERS, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE , AMERICAN FARM BUREAU FEDERATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS, AND RETAILERS ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF RESPONDENT IN RESPONSE TO THE PETITION

Michael E. Fine
Counsel of Record
Daniel M. Price
Powell, Goldstein, Frazer
& Murphy LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
Tel: (202) 347-0066

(Additional Counsel Listed on Inside Cover)

Of Counsel:
Robin S. Conrad
National Chamber
Litigation Center, Inc.
1615 H Street NW
Washington, DC 20062
Tel: (202) 463-5337

Jan Amundson
Quentin Riegel
National Ass'n of
Manufacturers
1331 Pennsylvania Ave. NW
Washington, D.C. 20004
Tel: (202) 637-3058

QUESTION PRESENTED

Whether the U.S. Court of Appeals for the First Circuit correctly held that the Commonwealth of Massachusetts's selective purchasing law targeting commerce with Burma unconstitutionally infringes upon the federal government's exclusive authority over foreign affairs, violates the Constitution's Foreign Commerce Clause, and is preempted by federal Burma sanctions legislation?

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BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(a) on written consent of all parties, the Chamber of Commerce of the United States, Organization For International Investment, National Association of Manufacturers, United States Council for International Business, American Insurance Association, American Petroleum Institute, American Farm Bureau Federation, Associated Industries of Massachusetts, and the Retailers Association of Massachusetts, respectfully submit this brief *amici curiae* in support of Respondent in response to the petition for a writ of certiorari.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are trade associations that have substantial common interests: ensuring stable and predictable legal regimes affecting international trade and investment, and promoting policies that secure for their members and the nation the benefits of free trade. All these organizations participated as *amici curiae* on appeal before the U.S. Court of Appeals for the First Circuit. In addition, the Chamber of Commerce of the United States and the Organization For International Investment participated as *amici curiae* in the proceedings before the U.S. District Court for the District of Massachusetts.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing more than 2.5 million U.S. businesses and

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[1] Pursuant to Rule 37.6, *amici* state that no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

organizations with 140,000 direct members of every size, sector, and region.[2] While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. Currently, 87 American Chambers of Commerce abroad in 77 countries are affiliated with the Chamber. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization For International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States. Members of OFII transact business throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all workers in the U.S. manufacturing sector and produce more than 80% of the nation's manufactured goods. An additional 158,000 businesses are

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[2] Some members of the *amici* are also members of Respondent National Foreign Trade Council. Memberships may also overlap among the *amici*.

affiliated with the NAM through its Associations Council and National Industrial Council.

The United States Council for International Business ("USCIB") advances the global interests of American business both at home and abroad. As the U.S. affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organisation of Employers, USCIB officially represents U.S. business positions both in intergovernmental bodies – such as the WTO, ILO, OECD, and U.N. system – and vis-à-vis foreign business communities and their governments. The USCIB addresses a broad range of policy issues with the objective of promoting an open system of world trade, finance, and investment. The USCIB membership consists of some 300 global corporations, professional firms, and business associations.

The American Insurance Association ("AIA") is a trade association representing more than 300 companies writing property and casualty insurance throughout the United States and around the world. AIA member companies are affiliated with more than 79,000 independent insurance agents in the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members, to provide a forum for discussion of policy problems of common concern to its members and the insurance industry, and to serve the public interest by participating in litigation that is of significance to the insurance industry.

The American Petroleum Institute ("API") is a non-profit trade association representing over 400 members involved in all aspects of the petroleum industry, including exploration, production, refining, transportation, and marketing. Many of API's members conduct business in foreign countries, and consequently have a direct interest in assuring that access to foreign markets is not unduly restricted by U.S. state and local regulations. In order to ensure that the United States continues to have diverse and

ample sources of energy supplies, energy companies must be able to explore new frontiers, and to participate in international trade and investment.

The American Farm Bureau Federation ("AFBF") is an agricultural membership organization formed to represent the business, economic, social, and educational interests of its members which is comprised of Farm Bureaus in all fifty states, Puerto Rico, and nearly 2,800 counties. With a membership approaching five million families, the AFBF is the nation's largest farm organization. Founded in 1919, AFBF's primary activities include lobbying, public relations, litigation, issue analysis and research, and personal and professional development of member farmers and ranchers. America's farmers have vital interests in the free flow of U.S. agricultural products in foreign commerce.

Associated Industries of Massachusetts ("AIM") is a non-profit business organization with approximately 5,000 members, all of which do business in the Commonwealth of Massachusetts. AIM regularly participates as a party or *amicus curiae* in cases raising issues of general concern for the business community. *See, e.g., Houghton-Mifflin Co. v. Commissioner of Revenue*, 423 Mass. 42 (1996); *AIM v. Secretary*, 413 Mass. 1 (1992). The Retailers Association of Massachusetts ("RAM") is a non-profit business association with approximately 1,500 members, comprised of retail companies of all types and sizes which do business in the Commonwealth of Massachusetts. AIM's and RAM's interest in this litigation stems from the importance of exports to the health of the Massachusetts economy and to the prosperity of Massachusetts businesses.

In aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States and, indirectly, much of the U.S. workforce. The *amici* are umbrella organizations charged with representing the legal and policy interests of their business members in matters of national import – such as this

litigation. Not only do the Massachusetts "Burma law" and other similar state and local economic sanctions laws damage the constitutional fabric, but they have had, and if the legal principles confirmed by the First Circuit were not respected would continue to have, a serious financial impact on many of the companies and workers represented by the *amici*.

SUMMARY OF THE ARGUMENT

The Commonwealth of Massachusetts has petitioned for a writ of certiorari to the U.S. Court of Appeals for the First Circuit on the premise that that court's decision in *NFTC v. Natsios*, 181 F.3d 38 (1st Cir. 1999), was in error.

Amici curiae disagree with that premise. This Court has long recognized that the power over foreign affairs and foreign commerce properly rests with the federal government. The First Circuit correctly held that states and localities may not enact selective purchasing laws that unconstitutionally infringe upon the federal government's authority over foreign affairs, that unconstitutionally discriminate against foreign commerce, or that are preempted by federal legislation. *Amici* also reject Petitioners' suggestions that the First Circuit's decision conflicts with this Court's precedents, or that any split of authority on these fundamental principles exists among the Circuits.

Amici believe that the First Circuit's definitive decision was correct, and that it should lead to the invalidation of all similarly defective state and local selective purchasing laws. *Amici* nevertheless face some risk, however: over twenty such laws are still on the books outside the First Circuit, and more could perhaps emerge – an outcome presaged by Petitioners' arguments. *See, e.g.*, Pet. at 16. *Amici*'s members must make significant long-term international trade and investment decisions. Those supplier relationships, sourcing commitments, and capital transfers remain at risk if states and municipalities, notwithstanding the First Circuit's decision, misguidedly follow Petitioners' reasoning. While *amici* firmly believe that such a development would be illegitimate in the face of the First Circuit's ruling (if this Court were to deny the Petition), any possibility of continued unpredictability for businesses is anathema to *amici*.

Accordingly, while convinced that the decision below was correct and that the Petition is substantively unfounded, *amici*'s concern for predictability in the conduct of international business leads them not to oppose the issuance of a writ of certiorari in this case.

ARGUMENT

I. The District Court and the Court of Appeals Correctly Decided the Case, Thereby Averting Fragmentation of Both Foreign Policy and the Flow of Interstate and Foreign Commerce

The Commonwealth of Massachusetts attempted to wield the substantial economic power of its procurement budget to implement its own foreign policy agenda. Specifically, it created a blacklist of companies engaged, however remotely, in commerce with Burma[3] and refused to do business with them in an explicit effort to influence that foreign country's domestic policies. Both the district court and the court of appeals recognized that Massachusetts's "Burma law" impermissibly infringed the federal government's plenary power over foreign affairs. The court of appeals also held that the selective purchasing measure violated the U.S. Constitution's Foreign Commerce Clause, and that it was preempted by federal statutes concerning Burma.

The courts below correctly applied this Court's precedents to uphold the principle that the pursuit of foreign

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[3] In June 1989, the current government decreed that the country's name be changed from the Union of Burma to the Union of Myanmar. For convenience, however, this brief refers to "Burma" throughout.

policy objectives, and the impairment of foreign commerce as a means to that end, are not among the prerogatives of the several states. The Constitution entrusts diplomatic and foreign economic policy to national authorities – that is, to Congress and the President. *Amici* reject Petitioners' suggestions that this Court's precedents have left open the possibility of any contrary result, or that the federal courts are divided on these fundamental issues.

The First Circuit's decision not only correctly applied bedrock constitutional principles and rules of law, but also averted substantial harm to U.S. commercial interests. As *amici* explained in their submissions below, Massachusetts's Burma law would have done grave damage to the free flow of interstate and international commerce.

The Commonwealth's law was only one of more than twenty sub-federal Burma sanctions laws in effect, with more believed to be waiting in the wings. Moreover, Burma is only one of many countries – among them Switzerland, China, Northern Ireland, Saudi Arabia, Egypt, and Turkey – that have been targets of state and local economic sanctions. And human rights abuses are surely not the only grounds a state or locality could cite to support the imposition of international trade barriers. Had the Massachusetts Burma law been permitted to stand, more such laws in support of a variety of foreign policy causes would surely have appeared in the 39,000-plus sub-federal jurisdictions[4] that exist in these United States.

Each individual measure can have a significant economic impact – the Massachusetts Burma law alone restricted bidding on some $2 billion in state purchases.[5] But

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[4] *See* Table 496: Number of Governmental Units, by Type (1997 data, excluding school and special districts), in *Statistical Abstract of the United States* (1998).

[5] *See* Court of Appeals Appendix at 87.

even where the impact of any single law might be limited, the proliferation of selective purchasing measures and other economic sanctions quickly imposes significant burdens on international commerce. As companies are forced to choose between doing business in Massachusetts or in Burma, in Los Angeles or in Switzerland,[6] in Philadelphia or in Northern Ireland,[7] and in Alameda County, California or in Nigeria,[8] for example, interstate and foreign commerce is fragmented and balkanized. Moreover, even the task of tracking such legislation can be beyond the resources of many businesses.

The courts' decisions below – like the constitutional doctrines that they correctly applied – serve to avert this serious economic harm. In holding the Commonwealth's Burma law unconstitutional, they not only reestablished the proper balance between federal and state authority in foreign affairs, but also forestalled the fragmentation of interstate and foreign commerce.

II. Any Continued Controversy over the Viability of Selective Purchasing Laws Would Be Detrimental to the Flow of Commerce

Amici believe that the First Circuit correctly decided the appeal below by applying well-understood precedents of this Court. They expect that the decision will properly lead to the invalidation of state and local international economic sanctions around the country. Should this Court deny the Petition, *amici* believe that every state and locality having or considering such a law would be obliged to acknowledge its constitutional infirmity.

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[6] *See* City of Los Angeles, Cal., Resolution No. 60 (1998).

[7] *See* Philadelphia (Pa.) Code § 17-104(b).

[8] *See* Alameda County (Cal.) Admin. Code ch. 4.36 (1997).

Nevertheless, some economic risk remains for *amici*'s members. Over twenty sub-federal procurement restrictions targeting foreign countries remain on the books in jurisdictions beyond the First Circuit's boundaries. *Amici* believe that those measures are invalid and that they face the same fate as the Massachusetts Burma law. But companies must make long term investment decisions about doing business abroad, and about doing business in states and localities across the United States. They must enter into long term supplier and distribution relationships abroad, while at the same time considering carefully the opportunities for sales to state and local entities. No matter how clearly invalid a selective purchasing law is in light of the First Circuit's ruling, it can still affect companies' business judgments by exposing them to at least some risk of being denied access to the government procurement market by a dissident local government.

Such risks will only be compounded if state and local legislators mistakenly believe Petitioners' arguments alleging the existence of doctrinal ambiguities to be valid. In that circumstance, they might well proceed – in error and contrary to law – to enact additional international economic sanctions notwithstanding the First Circuit's decision. The prospect that some small number of states and municipalities might continue to impose economic sanctions to achieve a multitude of self-proclaimed – and possibly conflicting – foreign policy goals heightens the risk of both conflict with our trading partners and retaliatory actions against U.S. businesses. Worse still, one can imagine the economic turmoil that would result if businesses properly proceed on the assumption that all such laws are indeed invalid, only to encounter a contrary decision by this Court years from now in another case.

Amici are quite concerned about the delay, confusion, and commercial uncertainty that could confront their members in the scenarios described above. Accordingly,

even though they entertain no doubt whatsoever as to the correctness and precedential clarity of the court of appeals' decision, they would welcome the finality that a ruling from this Court would provide. While *amici* do not consider that a definitive statement from this Court is necessary to support the nationwide invalidation of state and local international economic sanctions, they of course appreciate that such a holding would conclusively resolve the matter. Moreover, taking a decision in this particular case (in which the facts are undisputed, and the issues of law are clearly presented) would secure these benefits with a minimum of delay.

CONCLUSION

Although *amici* are fully convinced that the case was correctly decided by the U.S. Court of Appeals for the First Circuit, and although they reject the bases for the Commonwealth's Petition, a ruling by this Court regarding the invalidity of selective purchasing laws would secure predictability and finality for U.S. and international business activities. Accordingly, *amici* do not oppose the issuance of a writ of certiorari in this case.

Respectfully submitted,

Michael E. Fine, *Counsel of Record*
Daniel M. Price
Powell, Goldstein, Frazer
& Murphy LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
Tel: (202) 347-0066

October 27, 1999

Of counsel:
Robin S. Conrad
National Chamber
Litigation Center, Inc.
1615 H St. NW
Washington, DC 20062
Tel: (202)463-5337

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In The

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ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* STATES OF NORTH DAKOTA, ARKANSAS, CALIFORNIA, LOUISIANA, MARYLAND, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, OKLAHOMA, OREGON, RHODE ISLAND, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

HEIDI HEITKAMP
Attorney General of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record

600 East Boulevard Avenue
Bismarck, North Dakota 58505-0040
(701) 328-2210
Counsel for Amici States

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1695

Mark Pryor
Attorney General of
Arkansas
200 Tower Building
323 Center Street
Little Rock, AR
72201-2610

Bill Lockyer
Attorney General of
California
1300 I Street
Sacramento, CA 95814

Richard P. Ieyoub
Attorney General of
Louisiana
PO Box 94005
Baton Rouge, LA
70804-9095

J. Joseph Curran, Jr.
Attorney General of
Maryland
200 St. Paul Place
Baltimore, MD 21202

Mike Hatch
Attorney General of
Minnesota
Suite 1100
445 Minnesota Street
St. Paul, MN 55101-2128

Jeremiah W. (Jay) Nixon
Attorney General of
Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

Philip T. McLaughlin
Attorney General of
New Hampshire
State House Annex
25 Capitol Street
Concord, NH 03301-6397

Patricia A. Madrid
Attorney General of
New Mexico
PO Drawer 1508
Sante Fe, NM 87504-1508

W.A. Drew Edmondson
Attorney General of
Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK
73105-4894

Hardy Myers
Attorney General of
Oregon
1162 Court Street NE
Salem, OR 97310-0506

Sheldon Whitehouse
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

Jan Graham
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

Christine O. Gregoire
Attorney General of
Washington
1125 Washington Street
PO Box 40100
Olympia, WA 98504-0100

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INTRODUCTION

In 1996 Massachusetts enacted a law limiting the authority of state agencies to purchase goods and services from persons who do business with Burma. Subject to certain exceptions, the Massachusetts Burma Law effectively requires Massachusetts' state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do business with Burma. In the months following enactment of the Massachusetts Burma Law, the United States imposed economic sanctions on Burma. The First Circuit Court of Appeals struck down the Massachusetts Burma Law.

STATEMENT OF INTEREST OF *AMICI* STATES

The 14 *Amici* States submit this brief in support of Massachusetts' petition for a writ of certiorari of the First Circuit's decision.

The *Amici* States have a strong interest in ensuring that the decision of the lower court, which unduly intrudes upon the States' sovereignty, is reviewed and corrected by this Court. The Massachusetts Burma Law is not unique. It is similar to many state and local laws concerning Northern Ireland, Cuba, Switzerland, and Nigeria. The lower court's decision calls into question these and other laws and ordinances – laws and ordinances that legitimately exercise citizens' sovereign right to decide how to spend public money and to express their desire to disassociate themselves from actions or programs they deem improper or detestable.

The First Circuit's decision has an immediate and significant impact on States acting as market participants. The decision of the First Circuit infringes on the States' residuary and inviolable sovereignty retained under the Tenth Amendment by interfering with the States' ability to independently make decisions regarding government procurement, historically an area of exclusive state control. This sweeping intrusion into areas of traditional state authority interferes with the States' freedom to determine with whom and under what terms they will conduct business. The First Circuit's unprecedented decision precludes the States from properly acting as guardians of the public fisc and fully representing their citizens in decisions grounded in social conscience and morality.

SUMMARY OF ARGUMENT

Whether the market participant exception applies to the Foreign Commerce Clause and the federal government's foreign affairs power is an important question of federal law which should be addressed by this Court in light of its impact on the States. By refusing to apply the market participant exception to the Foreign Commerce Clause and the federal government's foreign affairs power, the First Circuit's decision severely limits the application of the market participant doctrine.

The Tenth Amendment to the United States Constitution reserves to the States fundamental areas of state sovereignty which are to be left to the sole control of the States. Other areas of strong local concern which traditionally have been areas of local control, at times, may be

limited by congressional action, but only when the federal statutes apply equally to all persons and not just to the States. State government procurement is historically an area of local control. The federal government has recognized this by its exclusion of state procurement from the international procurement agreements the United States has entered, unless the individual States decide to bind themselves. The First Circuit's decision, which refused to view state procurement as entitled to considerations of state sovereignty, runs contrary to prior decisions of this Court.

In *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994), this Court clarified the preemptive effect of the federal government's foreign affairs power and the Foreign Commerce Clause on state laws. The Court held that it was the role of Congress, not the courts, to determine whether state action interfered with the federal government's foreign affairs power. To preempt a state law, after *Barclays*, specific indications of congressional intent must be shown. The decision of the First Circuit disregards the clear direction of this Court in *Barclays* and instead applies a "strong presumption" of congressional intent to preempt when a state law may affect foreign affairs.

The First Circuit's decision also conflicts with this Court's holding that preemption does not apply to the States' actions as market participants.

Further, a conflict exists between the First Circuit's decision in this case and the Third Circuit's decision in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), on the level of

congressional intent required to preempt a State's regulation of government procurement, whether Congress has tacitly acknowledged and permitted selective purchasing laws, and whether the market participant exception applies to the Foreign Commerce Clause.

ARGUMENT

I. THIS COURT SHOULD DECIDE THE IMPORTANT ISSUE OF THE APPLICATION OF THE MARKET PARTICIPANT EXCEPTION TO THE FOREIGN COMMERCE CLAUSE AND THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER.

The decision of the First Circuit severely undermines the protection given the States by the market participant exception to the Commerce Clause. Since 1903, this Court has recognized that a State acting in a proprietary role is not subject to the same constraints as when acting as a regulator. *Atkin v. Kansas*, 191 U.S. 207 (1903).

> [I]t belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

Id. at 222-23. Specifically discussing government procurement, this Court has said: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those

with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

The impact of the Commerce Clause on the States when acting in their proprietary role was first addressed by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In *Hughes*, this Court held that the Commerce Clause does not impede the States when they have entered the market as a purchaser. *Id.* at 808-09. Since that decision, the Court has consistently held that the Commerce Clause is not implicated by a State's actions as a market participant. For example, in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court stated: "The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 436-37.

The Court in *Reeves* pointed out several policy considerations underlying the market participant doctrine: state sovereignty, the unquestioned freedom afforded private businesses to freely determine with whom they will conduct business, and the "role of each State as guardian and trustee for its people." *Id.* at 438 (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915)).

The policy considerations underlying the market participant doctrine apply equally to the federal government's foreign affairs power and the Foreign Commerce Clause. Certainly a State's right to exercise its own sovereignty in deciding with whom to do business is as strong internationally as it is nationally. The right of a business

to limit its dealings to companies of its choice is as strong when the business partners are foreign as when they are domestic. The role of the State as "guardian and trustee for its people" is as strong when the State's market participation affects foreign markets as when it affects interstate commerce.

This Court has never directly addressed the application of the Foreign Commerce Clause to the States when they are acting as market participants. As the Court said in *Reeves*: "We have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause or the constitutionality of 'Buy American' legislation." *Reeves*, 447 U.S. at 437 n.9.

The role of the States as market participants is one of great importance to the States. The First Circuit's decision severely undermines the States' sovereignty, their freedom to determine with whom and under what terms they will conduct business, and their ability to act as guardian and trustee for their citizens. Whether the Foreign Commerce Clause constrains the States when acting as market participants is an important question of federal law that has a broad impact on the States' autonomy. Because this is an important question of federal law which this Court should decide, the *Amici* States urge the Court to grant the petition for a writ of certiorari.

II. THE FIRST CIRCUIT'S DECISION UNDERMINES THE STATES' RIGHT OF SOVEREIGNTY IN THE AREA OF GOVERNMENT PROCUREMENT.

The First Circuit's decision in this case ignores the basic principles of state sovereignty previously identified

by this Court. In *Printz v. United States*, 521 U.S. 898 (1997), this Court reviewed the history of the Tenth Amendment of the Constitution of the United States and the manner in which it should be applied. In reviewing the "residuary and inviolable sovereignty" which the States retained under the Tenth Amendment, this Court pointed out that the Constitution contemplated "that a State's government will represent and remain accountable to its own citizens." *Id.* at 920. A State's decision on governmental purchasing is an area which requires a state government to be accountable to its citizens. Likewise, a State in enacting a selective purchasing law governing with whom the government may contract or under what conditions it may contract represents the State's citizens and acts as a guardian of the public fisc.

Under its Tenth Amendment analysis, the Court in *Printz* stated: "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 928. This is consistent with the Court's holding in *Reeves* that the basis for the market participant doctrine lies in state sovereignty. *Reeves*, 447 U.S. at 438. The Court in *Printz* quoted from its opinion in *New York v. United States*, 505 U.S. 144, 166 (1992) stating that the allocation of power contained in the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Printz*, 521 U.S. at 924. The corollary of this is that Congress is not free to regulate the States acting in their proprietary roles in any way that private businesses are not regulated. The holdings in *Printz* and *New York*, taken together, make suspect

under the Tenth Amendment any act of Congress which applies only to the States rather than to the people as a whole.

The First Circuit's decision that Massachusetts' actions regarding its governmental purchasing are preempted by the Federal Burma Law, the Foreign Commerce Clause and the federal government's foreign affairs power disregards the sovereignty principles laid out in *Printz*. Because Congress has not restricted private businesses in making procurement decisions, in determining with whom they will contract, or in making such decisions on grounds of social conscience or morality, Congress may not so limit the States when acting as market participants.

Government procurement historically has been an area of exclusive state control. The spending boycotts of the colonies began a long history of governments' using their purchasing power as a means of expressing their strongly held moral and political beliefs.

The federal government has recognized that procurement is an area of state sovereignty. While the United States committed itself to the Agreement on Government Procurement, attached as Annex 4 of the Agreement Establishing the World Trade Organization (WTO Agreement), the United States did not attempt to bind the States. Rather, the federal government left to each State the right to determine whether it would commit itself to the provisions of the procurement agreement. Similarly the 1979 Agreement of Government Procurement did not apply to the States. The federal government's actions thus recognized the importance of leaving decisions regarding

state and local government procurement, even when they may affect foreign commerce, to the States.

III. THE FIRST CIRCUIT'S HOLDINGS ARE INCONSISTENT WITH THIS COURT'S DECISIONS ON THE IMPORTANT FEDERAL QUESTION OF PREEMPTION OF STATE LAWS WHICH MAY AFFECT FOREIGN AFFAIRS.

In preemption analysis, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building and Const. Trades Council of Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.* (hereafter *Boston Harbor*), 507 U.S. 218, 224 (1993) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Consistent with these principles, this Court in *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994), held that it was the province of Congress – not the courts – to determine whether state action was preempted under the federal foreign affairs power or the Foreign Commerce Clause. In determining whether a state statute violated the federal government's foreign affairs power or the Foreign Commerce Clause, the Court looked for "specific indications of congressional intent" to preempt California's law. *Id.* at 324. The lack of any such indications led the Court to uphold California's law.

Rather than follow the Court's decision in *Barclays*, the First Circuit applied a "strong presumption" that

Congress intends to preempt a field when it legislates in an area of foreign relations. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 75 (1st Cir. 1999). Besides conflicting with the proper analysis for preemption in the area of foreign affairs laid down by the Court in *Barclays*, application of such a presumption in this case ignores the Court's holdings in a long line of cases which recognize the Commerce Clause market participant exception discussed in Argument I and the States' Tenth Amendment sovereignty discussed in Argument II.

In an attempt to determine congressional intent to preempt under the Foreign Commerce Clause, the Court in *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), reviewed the bilateral agreements the United States had with other countries. The Court found that the bilateral agreements prohibited only federal charges and did not preclude state taxation. Based on this, the Court held: "By negative implication arising out of [these international agreements], the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel." *Id.* at 12. Indeed, the Court continued, stating "the Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority. In our view, the facts presented in this case show that the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel." *Id.*

In accord with the Court's holding in *Wardair*, the Court in *Barclays* enunciated the principle that congressional silence on preemption, when Congress is aware of state statutes in the area in which it is legislating, constitutes Congress' implicit permission for the States to take

the action they have. *Barclays*, 512 U.S. at 325-26. Further, the Court in *Barclays*, consistent with the Court in *Wardair*, considered the treaties which the United States had entered and whether they showed an intent to govern the issue in question.

The First Circuit's decision in this case, by ignoring the implication of the federal government's exclusion of the States' procurement under the international procurement agreements, conflicts with the analysis set forth in both *Barclays* and *Wardair*. *See* Argument II above.

This Court has held that preemption doctrines do not apply to state laws governing the States' actions as market participants, but "apply only to state *regulation*." *Boston Harbor*, 507 U.S. at 227 (emphasis in the original). The First Circuit's decision conflicts with this Court's holding in *Boston Harbor* by not considering that preemption does not apply to state statutes that govern the State as a market participant.

Finally, by applying a presumption of intent to preempt, the First Circuit's decision conflicts with the established rule that preemption must be based on "clear and manifest" congressional intent where the area said to be preempted includes areas traditionally occupied by the States. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)).

Because the First Circuit's decision conflicts with a number of relevant decisions of this Court on the important federal question of preemption of state laws, the *Amici* States urge the Court to grant Massachusetts' petition for a writ of certiorari.

IV. A CONFLICT EXISTS BETWEEN THE FIRST AND THIRD CIRCUITS ON THE PREEMPTION ANALYSIS TO APPLY TO LAWS REGULATING STATE PROCUREMENT AND ON WHETHER THE MARKET PARTICIPANT EXCEPTION APPLIES TO THE FOREIGN COMMERCE CLAUSE.

The First Circuit's decision in this case is in direct conflict with the Third Circuit's decision in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991). The courts in both cases addressed challenges to a State's procurement law under the Foreign Commerce Clause, the federal government's foreign affairs power, and preemption under federal law. The conflicting analyses and holdings of the two Circuit Courts of Appeal in this area of highly significant importance to the States requires this Court to resolve the issues.

According to the First Circuit, the Tenth Amendment does not insulate the Massachusetts Burma Law from review because the federal government's foreign affairs power overrides States' actions, even in traditional areas of state concern. *National Foreign Trade Council*, 181 F.3d at 60-61. The Third Circuit relied on the policy enunciated in *Tafflin v. Levitt*, 493 U.S. 455 (1990), that federalism concerns raise a presumption that Congress ordinarily does not intend to displace existing state authority. *Trojan*, 916 F.2d at 906. The preemption analysis in the Third Circuit began with the recognition that a State's procurement policy is an area of traditional local control and thus is entitled to considerations of sovereignty. *Id.* at 910.

This difference in approach led the First Circuit to apply a strong presumption that any state law which

affects foreign affairs is preempted, while the Third Circuit held that a "clear and manifest" indication of congressional intent is required to preempt a state statute regulating state procurement. This direct conflict in the proper level of congressional intent needed to preempt a state procurement statute presents to the States a highly significant question of what actions States may take in regulating the entire area of the States' expenditures and investments.

The Third Circuit in *Trojan* reviewed the international procurement agreements which the United States had entered and found the federal government, by excluding state procurement from those agreements, had tacitly acknowledged and permitted selective purchasing laws. *Trojan*, 916 F.2d at 907-08. The First Circuit refused to consider the fact that the federal government had excluded state procurement from the international procurement agreements the United States entered.

While finding that Massachusetts' actions under the Massachusetts Burma Law went beyond acting as a market participant, the First Circuit's decision, nonetheless, strongly suggests that the market participant exception does not apply to the Foreign Commerce Clause. *National Foreign Trade Council*, 181 F.3d at 62-63, 65. The Third Circuit held in *Trojan* that the market participant exception to the Commerce Clause applied equally to both the domestic and foreign aspects of the Commerce Clause. *Trojan*, 916 F.2d at 910.

The conflict between the First and Third Circuits on the proper preemption analysis to apply to laws

governing state procurement, on Congress' tacit acknowledgment and acquiescence in selective purchasing laws, and on the application of the market participant exception to the Foreign Commerce Clause presents important issues for review by this Court.

CONCLUSION

For the foregoing reasons, the 14 *Amici* States respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

HEIDI HEITKAMP
Attorney General
State of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record

600 East Boulevard Avenue
Bismarck, North Dakota
58505-0040
(701) 328-2210

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IN THE
SUPREME COURT OF THE UNITED STATES

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NEW YORK CITY COMPTROLLER, LOS ANGELES, CALIFORNIA, PHILADELPHIA, PENNSYLVANIA, SAN FRANCISCO, CALIFORNIA, BOULDER, COLORADO, OAKLAND, CALIFORNIA, CARRBORO, NORTH CAROLINA, BERKELEY, CALIFORNIA, NEWTON, MASSACHUSETTS, SANTA CRUZ, CALIFORNIA, AMHERST, MASSACHUSETTS AND THE COUNTY OF ALAMEDA, CALIFORNIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Sara C. Kay
Jane R. Levine*
OFFICE OF ALAN G. HEVESI, COMPTROLLER OF THE CITY OF NEW YORK
One Centre Street
New York, New York 10007
(212) 669-3749
*Counsel of Record

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INTEREST OF AMICI CURIAE[1]

The decision of the First Circuit Court of Appeals in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), invalidates a Massachusetts selective purchasing law designed to discourage purchases by the state, using public money, of goods and services from businesses and individuals that do business with Burma (now known as Myanmar). This "Burma law" requires state agencies to deem that bids from such businesses and individuals are ten percent higher than the price actually offered. *See* Petition for a Writ of Certiorari, Sec. 2A. The ten percent competitive advantage afforded entities that do not do business with Burma reflects the preference of the citizens of Massachusetts and their elected officials not to use tax levy dollars in ways that support the profoundly antidemocratic government of Burma in its well-documented campaign of human rights abuses. The First Circuit ruled, *inter alia*, that the Commonwealth of Massachusetts lacked a "legitimate local purpose [for this law] that cannot be adequately served by reasonable nondiscriminatory alternatives" and held that the law unconstitutionally encroaches on federal authority over foreign affairs.

The *amici curiae* are cities, towns, counties or elected officials[2] of cities having selective purchasing laws similarly limiting their purchase of goods and services from putative

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

[2] The Comptroller of the City of New York is an independently elected official who, under the City Charter, has oversight authority over City contracting procedures, including compliance with selective purchasing laws, and who is a trustee of, and the investment advisor to, the City's pension funds.

contractors that do business with Burma and/or other countries. Each *amicus'* selective purchasing law is one of a series of initiatives intended to ensure that it conducts its fiscal affairs in a socially responsible manner -- which includes refusing to do business directly or indirectly with entities that violate basic human rights norms. In addition to using their purchasing power to attain this goal, many of the *amici* also encourage businesses that wish to attract their significant investment capital to act responsibly and ethically. The local government *amici* have a significant stake in the continued viability of selective purchasing laws and are concerned about maintaining the proper federal-state balance in this respect.

SOURCE OF AUTHORITY TO FILE

Amici have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Pursuant to Rule 37.2(a) of the Rules of this Court, *amici* obtained letters from each of the parties granting permission to file this brief, which accompany this submission.

SUMMARY OF ARGUMENT

The *amici curiae* urge this Court to grant Massachusetts' petition for a writ of certiorari because the decision below fails to give appropriate weight to the important state and local interests implicated by selective purchasing laws, describes a lesser role for state and local governments than was contemplated under our federalist system, and ultimately threatens to disrupt the legitimate business practices of a multitude of state and local governments nationwide.

Selective purchasing and investment laws, including the Massachusetts "Burma Law", Mass. Gen. Laws, Ch. 7, §§ 22G-22M, are important devices through which state and local governments structure their fiscal affairs to reflect the shared values and ethical concerns of their citizens. The First Circuit

improperly failed to accord any weight to Massachusetts' proprietary interest in controlling the disposition of its public funds, which is a well-established and central attribute of state sovereignty.

Absent Constitutional preemption, states and localities have the sovereign authority to make choices about the businesses and individuals with whom they wish to do business, even if those choices touch on foreign sensitivities. Therefore, the courts should defer to Congress to determine when a state or local action impinges on the exclusive federal foreign affairs power. Only Congress has the expertise, and Constitutional authority, to make this determination.

Increasing numbers of claims like those in this case inevitably will be presented to the courts as the demands of international commerce collide with the traditional sovereignty concerns of state and local governments under our federalist system. These claims will be even more common in the wake of the First Circuit decision, which inappropriately relied on complaints by foreign countries and trade organizations to make its determination that Massachusetts' Burma Law is unconstitutional. This analysis grants these entities a veto over state and local law and provides an incentive for them to lodge complaints against any state or local law that touches on their interests, however tangentially. The bare existence of trade complaints by self-interested foreign parties does not turn local communities' procurement and investment choices into the kind of "foreign policy" more properly within the federal government's control.

ARGUMENT

I. SELECTIVE PURCHASING LAWS REFLECT STRONG AND LEGITIMATE LOCAL INTERESTS CONCERNING THE USE OF PUBLIC MONEY THAT FALL WELL WITHIN THE RESERVED POWERS OF STATE AND LOCAL GOVERNMENTS UNDER THE CONSTITUTION.

In this case, the First Circuit has decided "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." United States Supreme Court Rule 10(c). The First Circuit's sweeping decision invalidating the Massachusetts Burma Law because it lacked a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" calls for review in this Court. *National Foreign Trade Council*, 181 F.3d at 70. The lower court's decision denies a central attribute of state sovereignty and threatens to upset the proper federal-state balance in this area.

There is no doubt that the federal government has broad authority over foreign affairs. However, it is equally clear that the states retain residual authority over matters not specifically delegated to the federal government, including areas of traditional state authority that may touch on foreign interests. *See Printz v. United States*, 521 U.S. 898, 919, 117 S. Ct. 2365, 2376-77 (1997) (states retain powers not expressly granted to the federal government); *see also* 10 Op. Off. Legal Counsel 49 (1986) ("[t]he historical rationale for the general federal power over foreign affairs does not imply the displacement of state proprietary power").

Selective purchasing laws like the Massachusetts Burma Law implicate a core aspect of state sovereignty: control over the use of local public assets, including spending and investment programs. *See Alden v. Maine*, 119 S.Ct. 2240, 2264-65 (1999). As "guardian and trustee" of public resources, a state or local government's decision not to use tax levy revenues to transact business, directly or indirectly, with entities that fail to respect basic human rights norms is a fitting expression of the collective will of its citizens on a matter of particularly local concern. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438, 100 S.Ct. 2271, 2273 (1980). Selective purchasing laws allow taxpayers collectively to express their values and preferences in matters of public procurement, much as private citizens do when refusing to purchase consumer goods from companies whose business, employment, or other practices they find offensive.[3]

There is no "nondiscriminatory alternative" to selective purchasing laws available to states and localities. The goal of selective purchasing laws is not merely to express generalized disapproval of Burma or other countries; it is to avoid using public money to help them continue in their objectionable activities. Enactment of one of these laws may be based on disgust at a putative contractor's human rights record. *See Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1981) (state may consider "moral integrity" of a contractor in deciding whether to award a public contract). It may derive from state and local representatives' fiduciary responsibility to consider whether the practices of a company seeking public investment or contracts compromise its value as an economic partner by inviting legal liability or consumer boycotts. In either event, these are issues of important local concern that cannot be satisfied by other means.

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[3] Indeed, there are strong arguments, which *amici* do not address here, that to the extent selective purchasing laws are pure expressions of public morality they enjoy First Amendment protection from interference by the federal government. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. (Feb. 1999).

It might be a different matter if, for example, a state or local government were to prohibit its citizens from transacting business with Burma, or from investing in companies with which Burma does business. But notwithstanding the First Circuit's unsupportable assertion that selective purchasing laws amount to "regulation" rather than market participation[4], this is not what they do. The multinational corporations and foreign government affected by Massachusetts' Burma Law are free to conduct business with anyone willing to contract with them, including residents of Massachusetts. The question here is whether state and local governments are required to do business with these entities despite their judgment that it is not in their citizens' interest to do so.

This question is important because state and local selective purchasing and investment initiatives represent community-based democracy at its best. These laws raise public consciousness on important questions of public policy and stimulate debate as to the best disposition of community resources. Galvanized by the prospect of public contracts going to contractors whose human rights and other practices offend basic values, citizens voice their concerns and participate in civic life. State and local representatives respond to their constituents by assessing public needs and ethical priorities and developing a fiscal program or set of programs that strikes a balance between them. If the balance is struck incorrectly or in a manner that does not reflect the interests of the electorate, the appropriate parties are easily held accountable on voting day. *See Alden*, 119 S.Ct. at 2264 ("the allocation of scarce resources among competing needs and interests lies at the heart of the political process").

In this highly political arena, the only legitimate way to determine whether a locality's spending activities have exceeded its authority and invaded the federal government's foreign affairs prerogative is to rely on the appropriate federal branch -- Congress -- to say so. If Congress believes that the business practices of a local government infringe on important foreign policy interests, it knows how to preempt them.[5] Local control over investment and purchasing decisions is part of our Constitutional history. Where, as here, Congress has "passively indicate[d]" that local practices do not "impair federal uniformity in an area where federal uniformity is essential", *Barclays Bank v. Franchise Tax Board*, 512 U.S. 298, 323, 114 S.Ct. 2268, 2281 (1994), state and local governments should be permitted to exercise their sovereign right to fiscal self-determination.

For this reason the First Circuit's readiness to declare illegitimate the local interests expressed through selective purchasing laws, particularly in the absence of any express constitutional prohibition or indication of Congressional preemption, is deeply troubling. As this Court recently cautioned in another case dealing with the balance between federal interests and state sovereignty:

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[4] The cases cited by the First Circuit for this proposition are inapposite. Unlike the law at issue in *South Central Timber Development Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (1984), selective purchasing laws do not affect "downstream" markets. Similarly, *Camps/Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S.Ct. 1590 (1997) involved state taxation, which is inherently regulatory, not state purchasing, which is not.

[5] As discussed in detail in Argument IV of the Petition for a Writ of Certiorari, this Court should review the lower court's finding that the 1996 Federal Burma Law preempts state and local selective purchasing laws.

> "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests [seeking public money] must be reached after deliberation by the political processes established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen . . .When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."

Alden, 119 S.Ct. at 2264-2265.

II. CONTINUING CHALLENGES TO SELECTIVE PURCHASING LAWS ACROSS THE COUNTRY ARE INEVITABLE.

This Court also should review the First Circuit's decision because the escalation of claims like the one in this case is inevitable. As even the court below acknowledged, 181 F.3d. at 59, n. 14, it is increasingly difficult to draw meaningful distinctions between "foreign" and "local" matters, particularly in the business context. Today, state and local governments routinely make purchasing and/or investment decisions involving foreign companies, foreign goods and foreign services. The increasing tension between our constitutional tradition of local control over spending and the demands of international trade calls for guidance from this Court.

Over the last twenty years, as trade with international entities has become more common, increasing numbers of state and local governments have adopted selective purchasing and other ethical guidelines for their business affairs. This phenomenon may be traced to the powerful grass-roots movement to divest public and private resources from apartheid-era South Africa; citizens began to learn about their

state and local governments' commercial relationships and to express objections to doing business with entities that fail to comport with basic standards of public morality or integrity. [6]

Many communities have enacted selective purchasing laws, like the Massachusetts law at issue here, that restrict public contracts with entities that do business with foreign sovereigns having poor human rights records. *See, e.g.,* Los Angeles, Admin. Code, §§ 10.38 et seq.; San Francisco, Admin. Code Ch.12J; Philadelphia, Code §17-104(b); Alameda County, Admin. Code, Ch. 4.32, Ch. 4.36; Oakland, Muni. Code, Ch. 2.04, Arts. II, III; City of Newton, Ordinance V-146; Boulder, Sec. 2-8-11, B.R.C. 1981. Other communities have adopted investment guidelines concerning the investment of public funds in these businesses or in others that engage in practices that offend community ethics. *See, e.g.,* Santa Cruz, City Council Policy No. 29.13 (Burma); Takoma Park, Ord. No. 1985-4, § 1 (investments in companies that produce nuclear weapons); Vermont Acts of 1999, ch. 13 (state pension funds required to support shareholder resolutions concerning Burma). Three states and a number of cities have enacted laws limiting the purchase of wood from tropical rainforests, buying only tropical timber that is harvested using ecologically-sound management practices.[7] Numerous cities and counties have laws prohibiting the procurement of products made in sweatshops.

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[6] According to one commentator, 23 states, 14 counties, 80 cities and the Virgin Islands enacted divestment or procurement laws directed to South Africa's apartheid policies alone. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, The American Journal of International Law, 821, 822 (1989).

[7] *See, e.g.,* Ariz. Rev. Stat. Ann. § 34-201 (West 1998); N.Y. State Fin. Law § 165 (McKinney 1998); Tenn. Code Ann. § 4-3-112 (1998); Baltimore, Ord. No. 635 (passed 1991); Bellingham, Resolution No. 43-90 (passed Aug. 1990); San Francisco, Ordinance No. 391-90; Santa Monica, Mun. Code. ch. 2.28.

See, e.g., North Olmstead Resolution No. 97-9 (1998). A number of jurisdictions have enacted "Buy-American" laws for public procurements. *See, e.g., Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (upholding Pennsylvania Steel Products Procurement Act), *cert. denied*, 501 U.S. 1212 (1991). Still other states and localities vest authority in government officials to consider non-economic issues in making investment and/or contracting decisions.[8] Many of these jurisdictions employ some combination of these strategies to effectuate the particular shared values and fiscal priorities of their citizens.[9]

In declaring Massachusetts' selective purchasing law unconstitutional, the First Circuit accepted the bare existence of complaints by trade associations and foreign sovereigns as evidence that it excessively interferes with foreign relations. *See National Foreign Trade Council*, 181 F.3d. at 54. However, the fact that local commercial activity may have some international ramifications simply demonstrates that the markets

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[8] For instance, state and local procurement laws often require a determination that a contractor is "responsible" before it can be eligible for government contracts. See, e.g., N.Y. Gen. Mun. L. § 103 (1998). Government officials can include non-economic criteria in this assessment, thereby incorporating general public interest values into their consideration.

[9] For example, New York City has enacted selective purchasing requirements for public procurements relating to corporate involvement in South Africa, New York City Charter §§ 1523(3), 1524; New York City Admin. Code §§ 6-115-a, 343-11.0 (all repealed in 1993); Burma, New York City Charter §§ 1523(3), 1524; New York City Admin. Code § 6-115 (1998); corporate participation in the Arab boycott of Israel, New York City Admin. Code § 6-114; corporate employment practices in Northern Ireland, New York City Admin. Code § 6-115.1; and the purchase of recycled products, New York City Admin. Code § 6-322. These matters all are of serious concern to New York citizens, and the singular mix of fiscal initiatives in place reflects that fact.

in which state and local governments, corporations and other private parties participate have become globalized. The mere existence of complaints by foreign parties does not transform decisions about community business priorities into the kind of "foreign policy" reserved for the federal government.

This analysis is of particular concern because it provides these entities with a strong incentive to lodge complaints about all such laws, regardless of how tangential the impact on international affairs. It dangerously threatens state and local sovereignty by essentially ceding veto power over these state and local laws to third parties who stand to profit if they are invalidated. The lower court's decision has put a risk the well-conceived purchasing and investment programs of literally dozens of states and localities nationwide. In view of the important state and local interests implicated, the First Circuit decision should be reviewed by this Court.[10]

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[10] The lower courts' decisions in this case also pose a concrete threat to the fiscal programs of state and local governments outside the parameters of the First Circuit. Respondent NFTC has sent carefully worded letters to a number of these jurisdictions detailing the potential for litigation -- and the risk of substantial attorneys fee awards -- on the basis of the lower courts' ruling. Absent review by this Court, the enactment and enforcement of ethical purchasing and investment laws nationwide may be chilled, particularly in small communities that can ill afford to pay for litigation against well-funded trade groups.

CONCLUSION

For the reasons stated above, the local government *amici* respectfully request this Court to grant the Petitioners' Request for a Writ of Certiorari.

Dated: New York, New York
October 20, 1999

Respectfully submitted,

Sara C. Kay, Associate General Counsel
Jane R. Levine, Third Deputy Comptroller*
OFFICE OF ALAN G. HEVESI,
COMPTROLLER OF THE CITY
OF NEW YORK
One Centre Street
New York, New York 10007
(212) 669-3749
Attorneys for *Amici Curiae*

**Counsel of Record*

Supreme Court, U.S.
FILED
JAN 12 2000
CLERK

No. 99-474

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

TIMOTHY B. DYK
Jones, Day, Reavis & Pogue
51 Louisiana Ave.
Washington, DC 20001
(202) 879-3939
Counsel of Record for Respondent

THOMAS F. REILLY
Attorney General of Massachusetts
THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext.2086
**Counsel of Record for Petitioners*

Petition Filed September 20, 1999
Petition Granted November 29, 1999

No. 99-474

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
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JOINT APPENDIX

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National Foreign v. Baker, et al
APPEAL{ED}

U.S. District Court
U.S. District Court - Massachusetts (Boston)

CIVIL DOCKET FOR CASE #: 98-CV-10757

National Foreign v. Baker, et al
Filed: 04/30/98
Assigned to: Chief Judge Joseph L. Tauro
Demand: $0,000 Nature of Suit: 950
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2201 Declaratory Judgment

NATIONAL FOREIGN TRADE COUNCIL
Timothy B. Dyk
Plaintiff [COR LD NTC]
Robert H. Klonoff
[COR LD NTC]
Gregory A. Castanias
[COR LD NTC]
Melissa Hart

[COR LD NTC]
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005
202-879-3734

Jacqueline M. Holmes
[COR LD NTC]
Jones, Day, Reavis & Pogue
599 Lexington Avenue
New York, NY 10022
212-326-3939

Michael A. Collora
[COR LD NTC]
Dwyer & Collora
600 Atlantic Ave.
Boston, MA 02110-2211
617-371-1000

v.

CHARLES D. BAKER, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts Defendant	Thomas A. Barnico [COR LD NTC] Attorney General's Office One Ashburton Place Room 1811 Boston, MA 02108 617-727-2200

Proceedings include all events.
1:98cv10757 National Foreign v. Baker, et al
APPEAL[ED]

PHILMORE IN HIS OFFICIAL CAPACITY AS STATE PURCHASING AGENT FOR THE COMMONWEALTH OF MASSACHUSETTS, III Defendant	Thomas A. Barnico (See above) [COR LD NTC]

U.S. CHAMBER OF COMMERCE E

Movant	Andrew N Vollmer [COR LD NTC] John A. Trenor [COR LD NTC] Wilmer, Cutler & Pickering 2445 M Street, N.W. Washington, DC 20037-1420 202-663-6000 James D. Smeallie [COR LD NTC] Sherburne, Powers & Needham One Beacon St.

Boston, MA 02108
617-523-2700

ORGANIZATION FOR INTERNATIONAL Andrew N Vollmer
INVESTMENT (See above)
Movant [COR LD NTC]
John A. Trenor
(See above)
[COR LD NTC]

James D. Smeallie
(See above)
[COR LD NTC]

EUROPEAN UNION David G. Leitch
Movant [COR LD NTC]
Gil A. Abramson
[COR LD NTC]
Roger P. Alford
[COR LD NTC]
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
202-637-6853

Richard L. Weiner
[COR LD NTC]

Proceedings include all events.
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APPEAL

Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
202-637-5600

WASHINGTON LEGAL FOUNDATION Daniel J. Popeo
Movant [COR LD NTC]
Washington Legal Foundation
1705 N Street, NW
Washington, DC 20036
202-857-0240

Evan Slavitt
[COR LD NTC]
Gadsby & Hannah LLP
225 Franklin Street
Boston, MA 02110
617-345-7000

David M. Young
[COR LD NTC]
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.

Washington, DC 20036
202-588-0302

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1:98cv10757 National Foreign v. Baker, et al

APPEAL

4/30/98 1 Complaint filed. Case assigned to Judge: Chief Judge Tauro. Receipt # 5909 Amount: $150.00. Fee Status: pd (cmg) [Entry date 05/01/98]

4/30/98 -- Summons issued for Charles D. Baker, Philmore Anderson III (cmg) [Entry date 05/01/98]

4/30/98 2 Motion by National Foreign for preliminary injunction, or, alternatively For Consolidation and Expedited Consideration of the Merits, FILED. (c/s) (cmg) [Entry date 05/01/98]

4/30/98 3 Memorandum by National Foreign in support of [2-1] motion for preliminary injunction, [2-2] motion For Consolidation and Expedited Consideration of the Merits, FILED. (c/s) (cmg) [Entry date 05/01/98]

4/30/98 4 Motion by National Foreign for leave to file in excess, FILED. (c/s) (cmg) [Entry date 05/01/98]

4/30/98 5 Motion by National Foreign for attys. Dyk, Klonoff, Castanias and Hart to appear pro hac vice, FILED. (c/s) (cmg) [Entry date 05/01/98]

5/1/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [4-1] motion for leave to file in excess. FILED. (cc/cl) (cmg)

5/1/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [5-1] motion for attys. Dyk, Klonoff, Castanias and Hart to appear pro hac vice, FILED. (cc/cl) (cmg)

5/1/98 6 Notice of appearance of attorney for Charles D. Baker, Philmore Anderson III by Thomas A. Barnico, FILED. (c/s) (cmg) [Entry date 05/04/98]

5/7/98 7 STIPULATION (Motion) by Charles D. Baker, Philmore Anderson III, to extend time to 14 days to respond to Motion for P.I., FILED. (c/s) (cmg) [Entry date 05/11/98]

5/11/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [7-1] stipulation motion to extend time to 14 days to respond to Motion for P.I., FILED. (cc/cl) (cmg)

5/11/98 8 Return of service executed as to Philmore Anderson III with service on 5/7/98 filed. Answer due on 5/27/98 for Philmore Anderson III (cmg)

[Entry date 05/12/98]

5/11/98 9 Return of service executed as to Charles D. Baker with service on 5/7/98 filed. Answer due on 5/27/98 for Charles D. Baker (cmg) [Entry date 05/12/98]

5/21/98 10 Answer by Charles D. Baker, Philmore Anderson III to complaint, FILED. (c/s) (cmg)

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6/2/98 11 Motion by National Foreign for protective order FILED. (c/s) (cmg) [Entry date 06/04/98]

6/2/98 12 Memorandum by National Foreign in support of [11-1] motion for protective order, FILED. (c/s) (cmg) [Entry date 06/04/98]

6/2/98 13 Affidavit of Frank D. Kittredge re: [11-1] motion for protective order, FILED. (c/s) (cmg) [Entry date 06/04/98]

6/2/98 17 Motion by National Foreign for Jacqueline Holmes to appear pro hac vice, FILED. (c/s) (cmg) [Entry date 06/22/98]

6/10/98 14 Memorandum by Charles D. Baker, Philmore Anderson III in opposition to [11-1] motion for protective order, FILED. (c/s) (cmg) [Entry date 06/11/98]

6/19/98 15 Chief Judge Joseph L. Tauro. Notice of Hearing/conference: set scheduling conference for 11:30 7/8/98 before Chief Judge Joseph L. Tauro. Joint statement to be filed five days prior to conf., FILED. (cc/cl) (cmg) [Entry date 06/22/98]

6/19/98 16 Chief Judge Joseph L. Tauro. Discovery Order entered: On or before 6/30/98, the parties shall have exchanged and reviewed all relevant documents in accordance with Local Rule 26.2(A) and sworn statements in accordance with Local Rule 26.1(B). Counsel to notify the court in writing 10 days prior to conf. of all pending motions, FILED. (cc/cl) (cmg) [Entry date 06/22/98]

6/22/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [17-1] motion for Jacqueline Holmes to appear pro hac vice, FILED. (cc/cl) (cmg)

6/29/98 -- STIPULATION (Motion) by National Foreign, Charles D. Baker, Philmore Anderson III setting deadlines for exchange of documents, FILED. (cmg)

6/29/98 20 Chief Judge Joseph L. Tauro. Stipulation entered re: exchange of documents, FILED. (cc/cl) (cmg) [Entry date 07/02/98]

6/30/98 18 Joint statement by National Foreign, Charles D. Baker, Philmore Anderson III, re: Local Rule 16.1(D), FILED. (c/s) (cmg) [Entry date 07/02/98]

6/30/98 19 Rule 16.1 Certification filed by Charles D. Baker, Philmore Anderson III, FILED. (c/s) (cmg) [Entry date 07/02/98]

7/2/98 31 Statement of counsel filed by National Foreign, Re: L.R. 26.1(B)(1) disclosure, FILED. (c/s) (cmg) [Entry date 07/13/98]

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7/6/98 21 Motion by National Foreign to amend [1-1] complaint, FILED. (c/s) (cmg) [Entry date 07/07/98]

7/6/98 22 Memorandum by National Foreign in support of [21-1] motion to amend [1-1] complaint, FILED. (c/s) (cmg) [Entry date 07/07/98]

7/6/98 23 Statement of counsel filed by Philmore Anderson III, Re: Local Rule 26.1(B)(2), FILED. (c/s) (cmg) [Entry date 07/07/98]

7/7/98 24 Motion by U.S. Chamber of Com, Organization for Int for leave to file Amicus Curiae, FILED. c/s) (cmg) [Entry date 07/13/98]

7/7/98 25 Motion by European Union for leave to file Amicus Curiae Brief, FILED. (c/s) (cmg) [Entry date 07/13/98]

7/7/98 26 Motion by European Union for R. Weiner, D. Leitch, R. Alford to appear pro hac vice fee status: pd fee amt: $50.00 Receipt # 7487, FILED.(c/s) (cmg) [Entry date 07/13/98]

7/8/98 27 Chief Judge Joseph L. Tauro. Protective Order entered, FILED. (c/s) (cmg) [Entry date 07/13/98]

7/8/98 -- Scheduling conference held. (cmg) [Entry date 07/13/98]

7/8/98 29 Chief Judge Joseph L. Tauro. Clerk's Notes: re: scheduling conf. Amicus Briefs Allowed. Motions to appear Pro Hoc Vice Allowed. Motion for Protective Order Allowed, Order entered. Dates in joint statement adopted. Motion to amend held in abeyance. Set status conference for 10:00, 9/23/98, before Chief Judge Joseph L. Tauro Court

Reporter: B. Sakurai. (cmg) [Entry date 07/13/98]

7/9/98 28 STIPULATION (Motion) by Washington Legal, for leave to file Amicus Curiae Brief, FILED.(c/s) (cmg) [Entry date 07/13/98]

7/9/98 30 Chief Judge Joseph L. Tauro. Order entered granting [25-1] motion for leave to file Amicus Curiae Brief; granting [24-1] motion for leave to file Amicus Curiae; granting [11-1] motion for protective order. The parties may treat Pltf's Motion for a Preliminary Injunction as the Pltf's Motion for S/J and opening briefs in support thereof. Pltf's stipulation of facts to be filed by 7/22/98. Deft's may file cross motion for S/J by 7/22/98. Pltf may file reply brief by 8/5/98. Set status conference for reset to 10:00 9/23/98 before Chief Judge Joseph L. Tauro, FILED.(cc/cl) (cmg) [Entry date 07/13/98]

Proceedings include all events.
1:98cv10757 National Foreign v. Baker, et al
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7/13/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [26-1] motion for R. Weiner, D. Leitch, R. Alford to appear pro hac vice fee status: pd fee amt: $50.00 Receipt # 7487, FILED. (cc/cl) (cmg) 7/13/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [28-1] stipulation motion for leave to file Amicus Curiae Brief, FILED. (c/s) (cmg) [Entry date 07/16/98]

7/13/98 32 Amicus Curiae brief by Washington Legal, FILED. (c/s) (cmg) [Entry date 07/16/98]

7/15/98 33 Document disclosure by National Foreign, FILED. (c/s) (cmg) [Entry date 07/16/98]

7/20/98 34 Joint motion by National Foreign, Charles D. Baker, Philmore Anderson III to amend [30-1] order establishing filing schedule, filed. (mr) [Entry date 07/21/98]

7/23/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [34-1] joint motion to amend [30-1] order establishing filing schedule. The parties shall file their joint stipulation of facts no

later than 7/24/98; set cross motion filing for summary judgment deadline for 7/27/98 and responsive brief no later than 7/27/98; reply brief by 8/13/98. (cc/cl) (tmc) [Entry date 07/24/98]

7/24/98 35 STIPULATION of facts by National Foreign, Charles D. Baker FILED. (c/s) (cmg) [Entry date 07/27/98]

7/24/98 36 Transcript of proceedings for held on proceeding date: 7/8/98 before Judge: Chief Judge Tauro. Court Reporter: Barbara Sakurai (cmg) [Entry date 07/27/98]

7/27/98 37 Motion by Charles D. Baker, Philmore Anderson III for summary judgment and Statement of Undisputed Material Facts FILED. (c/s) (cmg) [Entry date 07/28/98]

7/27/98 38 Memorandum by Charles D. Baker, Philmore Anderson III in support of [37-1] motion for summary judgment and Statement of Undisputed Material Facts, FILED. (c/s) (cmg) [Entry date 07/28/98]

7/27/98 39 Affidavit of Harold Fisher re: [37-1] motion for summary judgment and Statement of Undisputed Material Facts, FILED. (c/s) (cmg) [Entry date

07/28/98]

7/27/98 40 Affidavit of Kathleen Molony re: [37-1] motion for summary judgment and Statement of Undisputed Material Facts, FILED. (c/s) (cmg) [Entry date 07/28/98]

7/27/98 41 STIPULATION by Charles D. Baker, for leave to file memo in excess of 20 pages, FILED. (cmg) [Entry date 07/28/98]

Proceedings include all events.
1:98cv10757 National Foreign v. Baker, et al
APPEAL

7/27/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [24-1] motion for leave to file Amicus Curriae. FILED. (cc/cl) (cmg) [Entry date 07/28/98]

7/27/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [25-1] motion for leave to file Amicus Curiae Brief FILED. (cc/cl) (cmg) [Entry date 07/28/98]

7/27/98 42 Amicus Curiae brief by U.S. Chamber of Com, FILED. (c/s) (cmg) [Entry date 07/28/98]

7/27/98 43 Amicus Curiae brief by National Foreign, filed. (cmg) [Entry date 07/28/98]

8/10/98 -- Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg) [Entry date 08/25/98]

8/13/98 -- Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg)

8/13/98 44 Response by National Foreign in opposition to [37-1] motion for summary judgment and Statement of Undisputed Material Facts, FILED. (c/s) (cmg) [Entry date 08/14/98]

8/13/98 45 Supplemental Affidavit of Frank D. Kittredge, re: [44-1] opposition response, FILED. (c/s) (cmg) [Entry date 08/14/98]

8/25/98 -- Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg)

9/15/98 46 Letter by Michael A. Collora, dated: 9/14/98 to: Z. Lovett re: Hearing on 9/23/98 filed. (mr)

11/4/98 47 Chief Judge Joseph L. Tauro. Memorandum and Order entered. The plaintiff's motion for summary judgment and its unopposed motion to amend the compalint are ALLOWED. The Defendant's cross motion for sumary judgment is

DENIED. (see order for details) cc/cl (mr) [Entry date 11/05/98]

11/4/98 48 Chief Judge Joseph L. Tauro. Order entered denying [37-1] motion for summary judgment and Statement of Undisputed Material Facts, granting [21-1] motion to amend [1-1] complaint, mooting [2-1] motion for preliminary injunction, mooting [2-2] motion For Consolidation and Expedited Consideration of the Merits. (motion for preliminary injunction and motion for consolidation and expedited consideration of the merits treated as plaintiff's motion for summary judgment.) Plaintiff's motion for summary judgment (#2) is ALLOWED. cc/ccl (mr) [Entry date 11/05/98]

11/13/98 49 Motion by National Foreign for final judgment and Declaratory relief, filed. c/s (mr) [Entry date 11/16/98]

Proceedings include all events.
1:98cv10757 National Foreign v. Baker, et al

APPEAL

11/17/98 50 Chief Judge Joseph L. Tauro. Judgment entered for National Foreign against Charles D. Baker, Philmore Anderson III., cc/cl (mr) [Entry

date 11/18/98]

11/18/98 -- Case closed. (mr)

11/23/98 51 Notice of appeal by Charles D. Baker, Philmore Anderson III filed. Fee Status: pd Fee Amount: $105.00 Receipt # 321 10574 Appeal record due on 12/23/98 (Appealing judgment on 11/17/98). (mmh) [Entry date 11/24/98]

11/23/98 -- Copy of Notice of Appeal mailed to all counsel of record. Transcript Notice and Order form provided to appellant's counsel. (mmh) [Entry date 11/24/98]

11/23/98 52 Defendants' certificate regarding completion of transcript. (mmh) [Entry date 11/24/98]

11/23/98 55 Motion by Charles D. Baker, Philmore Anderson III to stay pending appeal, FILED. (c/s) (cmg) [Entry date 12/08/98]

11/25/98 53 STIPULATION (Motion) by National Foreign, to extend time to request attys' fees, FILED. (c/s) (cmg) [Entry date 11/30/98]

12/4/98 54 Transcript of proceedings for held on proceeding date: 9/23/98 before Judge: Chief Judge Tauro. Court Reporter: Barbara Sakurai. (cmg)

12/4/98 -- Mail sent to Daniel Popeo returned by Post Office because: moved, not forwardable. (cmg)

12/7/98 56 Memorandum by National Foreign in opposition to [55-1] motion to stay pending appeal, FILED. (c/s) (cmg) [Entry date 12/08/98]

12/14/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered granting [53-1] stipulation motion to extend time to request attys' fees, FILED. (cc/cl) (cmg) [Entry date 12/15/98]

12/14/98 -- Chief Judge Joseph L. Tauro. Endorsed Order entered denying [55-1] motion to stay pending appeal. The defts having filed a Notice of Appeal on 11/23/98, this motion is Denied as moot, FILED. (cc/cl) (cmg) [Entry date 12/15/98]

12/16/98 -- Transmitted supplemental record on appeal: re: [51-1] appeal (Appeals case manager supplemented documents #51, 53, 55 & 56 to the USCA). (mmh)

[END OF DOCKET: 1:98cv10757]

Relevant
Docket Entries

Andrew S. Natsios,
Secretary of Administration
and Finance, and another,
Appellants,

v.

National Foreign Trade Council,
Appellee.

United States Court of Appeals
for the First Circuit
No. 98-2304

12/22/98 CIVIL case docketed. Notice filed by Thomas A. Barnico for Appellant Frederick Laskey.

12/11/98 RECORD ON APPEAL filed:
2 volume and IMPOUNDED ENVELOPE IN SAFE.

12/17/98 SUPPLEMENTAL RECORD consisting of document nos. 51, 53, 55 & 56 filed.

12/29/98 APPELLANT's BRIEF and APPENDIX filed on behalf of Frederick Laskey, Philmore Anderson.

3/4/99 BRIEF filed by Appellee National Foreign Trade Council.

3/4/99 DISCLOSURE STATEMENT on behalf of Appellee National Foreign Trade Council filed.

3/18/99 REPLY BRIEF filed by Appellant Frederick Laskey, Appellant Philmore Anderson.

5/4/99 CASE ARGUED 05/04/99. Lynch, Coffin, Cyr, JJ.

6/11/99 LETTER filed by appellant regarding case caption.

6/11/99 Order December 30, 1999 filed. This court having been advised that defendant Laskey has been replaced by a new Secretary of Administration and Finance. It is ordered that the name of Frederick Laskey be replaced with the name Andrew S. Natsios in the caption of this case.

6/22/99 OPINION filed. Lynch, Coffin, Cyr signed Judge Sandra L. Lynch, Authoring Judge PUBLISHED.

6/22/99 JUDGMENT filed. Judges Lynch, Coffin, Cyr. Closing case.

7/15/99 MANDATE ISSUED.

7/15/99 RECORD returned to originating court.

9/23/99 U.S. Supreme Court Notice filed regarding petition for writ of certiorari. Filed in the Supreme Court on 09/20/99. Supreme Court case number: 99-474.

12/2/99 U.S. SUPREME COURT ORDER granting petition for writ of certiorari filed in the Supreme Court on 11/29/99.

The Commonwealth of Massachusetts
House of Representatives

BYRON RUSHING
Chair, The Committee on Public Services
Vice Chair, House Committee on Redistricting
State House - Room 39
Boston, MA 02133-1853
(617) 722-2240
Ninth Suffolk District
Alice Taylor
Copley Place
Roxbury
Lower Roxbury
Prudential
St. Botolph
South End

February 28, 1995

Representative Christopher Hodgkins
Senator Warren Tolman
Chairmen
Committee on State Administration
State House - Room 34
Boston, MA 02133

Dear Representative Hodgkins and Senator Tolman:

I am writing you in support of H. 2833, an Act to Regulate

State Contracts With Companies Doing Business in Burma. Its passage would add our state to the various governments supporting the restoration of democracy in Burma.

In the free elections in Burma in 1990, the National League for Democracy led by Nobel Peace Prize laureate, Aung San Suukyi, received 80 percent of the votes cast. Since that time Suukyi has been under house by the martial administration law known as "SLORC" (State Law and Order Restoration Council). This military junta has committed well-known human rights violations including the systematic murder, rape, and torture of civilians, and drug trafficking. According to the Burma Rights Movement for Action Group, "SLORC" has managed to survive through revenues generated by foreign investments and by a market for the export of the nation's natural resources. Burton Levin, the Former U.S. Ambassador to Burma, explains that "foreign investment in most countries act as a catalyst to promote change, but the Burmese Regime is so single minded that whatever they might obtain from foreign sources they pour straight into the army while the rest of the country is collapsing."

H.2833 establishes a "selective purchase" program for state vendors doing business in Burma. It is based on the "selective purchase" program used so effectively by this state to put pressure on the pro-apartheid government of South Africa. The Secretary of Administration and Finance would compile a list of businesses that do business in Burma. Persons with operations in Burma for the sole purpose of reporting news, providing international telecommunications, and disseminating

medical supplies would be exempt. Otherwise companies on the list would be awarded a contract only if their bids are 10% or less than the bids of companies not doing business in Burma. Goods and services could also be procured from a company when a state agency certifies to the Secretary of Administration and Finance that the procurement is vital to the operations of the state agency.

Considering the deterioration of human living conditions in Burma, where military generals have stolen an entire country's resources and population through force, the Commonwealth of Massachusetts should not provide contracts to companies that do business with this dictatorship government. The Commonwealth has a history of assisting fledgling, democratic movements throughout the world. Burma calls on our support now.

The new South Africa demonstrates that economic pressure can be effective in moving governments away from oppression. Continued pressure from Massachusetts is necessary to vigorously combat well documented repression and intolerance in Burma.

I enclose recent news articles on the situation in Burma and on Reebok's and Liz Claiborne's decisions to cut ties with the SLORC government.

Yours truly,
/s/
Byron Rushing

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 98-CV-10757-JLT

NATIONAL FOREIGN TRADE COUNCIL,	)
Plaintiff,	)
v.	)
CHARLES D. BAKER, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts, et al.,	)
Defendants.	)

DECLARATION OF LINDA BERNIS

I, Linda Bernis, hereby depose and state as follows:

1. I am a stenographer who works as an independent contractor for O'Brien & Levine, a court reporting services agency located at 1287 Commonwealth Avenue, Boston, Massachusetts.

2. On April 17, 1998, I viewed portions of three videotapes in the Special Collections Department of the State House Library in Boston, Massachusetts and made true and accurate

shorthand notes of the audio from these videotapes.

3. The attached transcript is a true and accurate version of the shorthand notes I made from the videotapes I viewed on April 17, 1998. See Exhibit A.

SWORN TO AND SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 25th DAY OF APRIL, 1998.

/s/
Linda Bernis

(HOUSE DEBATE ON H2833: July 19, 1995)

HOUSE SPEAKER: The first matter passed over is on page 21, calendar item number 759. Third reading of the bill.

THE CLERK: An Act Regulating State Contracts with Companies Doing Business With or in Burma/Myamar.

HOUSE SPEAKER: Question comes on passing the bill to be engrossed pending which Representative Rushing offer an amendment which the clerk will read.

THE CLERK: Mr. Rushing of Boston moves that the bill be amended in section one as printed by inserting after the word "having" in line 13 the words "a principal place of business place of incorporation or corporate headquarters in Burma Myamar or having" and in section two as printed by striking out the paragraphs contained in lines 1 to 25 inclusive.

HOUSE SPEAKER: The question comes in the amendment. All in favor say aye. All opposed say no. The ayes have it. Recurring question comes on passing the bill to be engrossed. Mr. Teague of Yarmouth offers an amendment which the clerk will read.

THE CLERK: Mr. Teague moves the bill be amended in section one, lines 12, 15, 18, 25,

26, 28, 34, 35, 39 and 42, in section two, lines 8, 13, 59, 78, 79, 84 and 94, and in section four, line 10, by inserting after the word "Myamar" in each instance insert the words "and/or China."

HOUSE SPEAKER: The question comes on the amendment. Mr. Teague of Yarmouth. Members kindly take a seat.

HOUSE SPEAKER: The question comes on the amendment, Mr. Teague of Yarmouth.

MR. TEAGUE: Thank you, Mr. Speaker. I hope the amendment is adopted.

Mr. Speaker, from time to time over the years Massachusetts General Court, this is no laughing matter, has decided to engage in their own little version of foreign policy by restricting investments, primarily from our state pension funds and prohibiting pensions in policies we find offensive. There are many of those.

The gentleman from Boston has filed a bill to impose such restrictions with respect to Burma, a nation ruled by a tyrant where there is much turmoil and restriction on human rights of various sorts. However, it is not alone in those offenses against humanity and against its citizens and sojourners. I would suggest

that there are nations that have track records which are yet more reprehensible, more rigid, less understanding, more demanding and more patently offensive to our understanding of human rights and dignity, which is why I offer this amendment to include China, mainland China.

Mr. Speaker, as we talk, there is an American citizen, a naturalized American who was born in mainland China named Harry Wu, who has in fact been active on the Asian continent, and in asking the Chinese government to provide what we would consider minimal human right sand constitutional guarantees to its people.

Mr. Speaker, Harry Wu has been arrested by the Chinese government and is held incommunicado on a spurious charge that he is an illegal immigrant based on the claim that the name on his passport is not the same as his given English name, Peter Harry Wu. And Mr. Speaker, the sole reason for that is because he has been outspoken with regards to the persistent intentional policy of human rights violations that is the standard operation of the government of mainland China.

Mr. Speaker, if we are to begin engage in foreign policy restrictions and prohibitions, if we are to trek down that

route, I think we ought to start with the most egregious and certainly the regime currently ruling the nation of Burma is offensive. In the past we've had restrictions on investments in Northern Ireland, in South Africa because of the offensive political activity restrictions on individual liberty in those nations. None of us tolerate those very well, but if we are going to get into that business then I say let's start at the top.

And Mr. Speaker, I don't think anybody is going to stand here and defend the nation of China. And if we are to do a comparative analysis, and obviously we are because among the nations of the world we are selecting Burma as the one nation that we should consider for restrictions that our investments, if we are to do that type of comparative analysis, let's really do an analysis and look at some of the nations who have as their official policy for a period of 45 to nigh unto 50 years now, a rigid, in some cases cruel abuse of human rights in the most essential aspects, restriction on individual mobility, restriction on freedom of religion, restriction on freedom of the press. All manner of impositions on individual liberty.

Mr. Speaker, the reason Harry Wu

is locked up is because he's there talking about human rights. He's an American. If they do that to an American, think of what they do to their own people and what they've done for the last 50 years.

If this bill, which restricts investments here in Massachusetts so as to prohibit offensive nations from benefiting from the public funds of the Commonwealth, has merit, then I say we should do first things first.

Mr. Speaker, in this particular case, I would say that China has amply demonstrated their scorn for what we consider typical standards of human dignity and civility and the case of Harry Wu demonstrates that. Mr. Speaker I hope the amendment is adopted..

HOUSE SPEAKER: Mr. Rushing of Boston.

MR. RUSHING: Mr. Speaker, the first thing I want to do make is very clear what this legislation does. What this legislation does is that it establishes a program that is called selective purchase in regard to the country of Burma. It does that for a simple reason. We, in this legislature, have the proud reputation of being one of the leaders in this country and in this world in being of joining in the movement

to restore democracy in South Africa, and we learned in that process two things. One is, that if you're going to engage in foreign policy, you have to be very specific. You have to be very specific. And you have to be able, you have to be able to identify a goal that you will know when it is realized. We identified a goal around South Africa. That goal was to end apartheid and we would know when it was realized when there were elections in that country that every person could participate in.

When that happened, and for our piece of that we had various forms of state sanctions in Massachusetts for 12 years, 12 years. And when that identifiable event occurred, we ended all of our sanctions that we had created here. Burma is a country that was in the process of restoring democracy. It had at first a left wing, a socialist totalitarian regime. There was a movement to restore democracy. That movement became more and more successful, and in 1989 the leader of that movement was placed under house arrest.

In 1990 that leader's party won a democratic election overwhelmingly, and the people elected in that election were never allowed to sit, and instead Burma

was overtaken by a right wing totalitarian regime. That right wing totalitarian regime is a regime that is in power now. It is a regime that has killed literally thousands of its country's people, and it is that regime that the democratic movement in Burma is attempting to overthrow and to again have free elections in that country. That is what the identifiable goal is, free democratic elections in Burma.

The other thing we understood and learned from in South Africa was that there had to be a clear movement outside of that country, exiles outside of that country who were working for these goals so that there was always people in countries where they could communicate and we would be able to be in some communication with the forces that wanted to restore democracy.

We all here in this state, Democratic and Republican, can now go around the world bragging, literally bragging about what a wonderful thing we did when we joined in that international movement to end apartheid in the United States, in South Africa, and we should. We should be proud of that.

The governor of Massachusetts is going to South Africa next month. He is

going to South Africa next month. All of the major leaders of South Africa are going to meet with the governor of Massachusetts when he is in South Africa for four days, not because he is the descendent of Cromwell's chaplain. They are going to meet with the governor because he is the governor of Massachusetts, the state that was one of the first in this country to begin sanctions against South Africa.

There were two major forms of sanctions that we took. We ended all of our investments in our pension funds in companies that did business in South Africa. The other sanctioning that we did was what we are proposing in this bill in regard to Burma. We said that the state would not buy any goods and services from companies that do business in South Africa.

HOUSE SPEAKER: Mr. Teague of Yarmouth. For what purpose does the gentleman rise? The gentleman yields. Mr. Teague of Yarmouth.

MR. TEAGUE: I appreciate the gentleman yielding because I am interested in the history. Some of the members may not be familiar with it. What I am more interested in is, given the gentleman's objection to the regime in Burma and his

interest in restoring democracy there, does he have the same interest in restoring democracy with regards to China where the regime is at least as offensive, if not more so, and is he thereby willing to adopt the same standards with respect to China as with respect to Burma, given the successful efforts we have had in the past.

HOUSE SPEAKER: Mr. Rushing of Boston.

MR. RUSHING: What the gentleman from Yarmouthport does not want to hear is the rationale for this legislation, because I'm going to answer his question, because his question is what the amendment is and this happened by his predecessors in this house who were opposed to any action by this house around anti-apartheid. Every time we brought up a bill related to South Africa, the Republican leadership would have tried to amend it by adding every other dastardly nation in the world. And what does that do?

HOUSE SPEAKER: Mr. Teague of Yarmouth. What purpose does the gentleman rise? Gentlemen yields.

MR. TEAGUE: Thank you, Mr. Speaker. I appreciate the gentleman's kindness in yielding. Mr. Speaker,

perhaps the reason that some of these nations flourish under the conditions they do is because the legislature has not taken the same initiative having claimed to do so in these other cases of the dastardly nations that you so properly identify. Then perhaps we should grasp this opportunity to incorporate them into this legislation subjective to the same rigid standards as you yourself identify have been successful and thereby turn them around.

I am wondering if the gentleman will join me in that effort because failing that then perhaps change will come more slowly if not at all. If the gentleman is willing to join towards that end.

HOUSE SPEAKER Mr Rushing of Boston.

MR. RUSHING: The minority leader should know this, that I will absolutely join him in that, but what I am not going to do that, what I am not going to do is to trivialize the movement for restoring democracy in Burma by adopting these amendments, and I will tell you why. I will tell you why. And this is why Because you have never filed a bill to do that. You have never filed a bill to say that this legislature should engage in the

movement to restore democracy in China.
You have never talked about a bill to reject, to restore democracy in North Korea. You have never filed a bill. You know why? I know that because there's never been a hearing on any of those bills.
HOUSE SPEAKER: What purpose does the gentleman rise? Gentleman yields. Mr. Teague of Yarmouth.
MR. TEAGUE: Thank you, Mr. Speaker. The gentleman is quite correct, I haven't filed a bill to that measure, nor did I file a bond bill to construct prisons which we just debated this afternoon. Nonetheless, amendments were offered. There is no corner on the market for good ideas, but it appears that the gentleman's point that there are regimes that impose extraordinary standards on their citizens, and the gentleman says that he is opposed to that type of behavior by nations.
If that is to be the case, then ought we not look at other nations and attempt to be uniformed in our application. Quite frankly, if we did that then perhaps we might have the desired effect. You well illustrated the case of South Africa in which we participated. You suggest trivializing.

It is not trivial when a nation has American citizens incarcerated specifically because they are out pursuing human rights initiatives in that nation. I don't think that is trivial. I think that is substantial with the same substance as the measure in front of us which is why I offer the amendment.
HOUSE SPEAKER: Mr. Rushing of Boston. Gentleman yields.
MR. RUSHING: You missed my point. My point is, if you take this stuff serious, if you work on this stuff, one of the things you do is you draft legislation that is useful for the movement of people who are attempting to do the particular task they are involved in.
The legislation that we did for South Africa was designed so that it would be useful for the forces for the pro-democracy and anti-Apartheid forces in South Africa. It was what they wanted. It was what they wanted. Now you tell me what the pro-democracy forces in North Korea want. You tell me that. You answer that question for me. And you don't know the answer to that because you haven't talked to them about it.
HOUSE SPEAKER: The house will be in a brief recess.

HOUSE SPEAKER: Recurring questions comes on ordering the bill to a third reading. All those in favor say aye. All opposed no. The ayes have it. The bill is ordered to a third reading.

(SENATE DEBATE ON H2833: March 20, 1996.)

SENATE PRESIDENT: The present item passed over is item 665 on the first page. The senator from Hampden and Hampshire, Mr. Lees.

MR. LEES: I move that this matter be postponed for three weeks.

SENATE PRESIDENT: The senate will come to order. The senator from Hampden and Hampshire, Mr. Lees.

MR. LEES: Mr. President, I would withdraw that motion. And Mr. President, I am very curious why members of this legislature, if it's so good, why isn't the Congress of the United States doing it? Why isn't the president of the United States saying Burma ought to be put into this? But, no, we, Mr. President, and the Massachusetts legislature tried to set up some foreign policy business guidelines, so because of that I move the matter be laid upon the table.

SENATE PRESIDENT: The senator from Hampden and Hampshire has asked

unanimous consent to withdraw his motion that the matter be postponed until April 10th. Is there an objection to his request to withdraw his motion? The chair hears none.

The senator from Norfolk and Suffolk, Ms. Walsh.

MS. WALSH: The minority leader may be pleased to learn the Federal Government gets many of its best ideas from the Commonwealth of Massachusetts, including its constitution, so we look forward to the future debate on how we can advance civil and human rights in the country of Burma by our business dealings with the Commonwealth of Massachusetts. Thank you, Mr. President.

SENATE PRESIDENT: The senator from Hampden and Hampshire, Mr. Lees.

MR. LEES: If it's such a great idea then maybe the senator who just took her seat could ask the president of United States to put it in his foreign policy guidelines and business guidelines, but I don't know why we continue to try to hurt Massachusetts business while the federal government, if it's such a great thing to do, doesn't do it.

Again, Mr. President, I think this matter should be laid upon the table.

SENATE PRESIDENT: The matter before the body is on the motion of the senator from Hampden and Hampshire to lay the matter on the table. All those in favor. Under the rules placed in the orders of the day for the next session.

(SENATE DEBATE ON H2833: April 10, 1996.)

SENATE PRESIDENT: The next item passed over is item 6635. The main question being on bill to a third reading. Coming first on the motion previously moved from the senator from Hampden and Hampshire to lay the matter on the table. Ten minute debate, 3 minutes per senator. The senator from Middlesex, Ms. Hicks.

MS. HICKS: I hope this matter is laid upon the table. There has been extensive discussion on this, and I must admit, I continue to come back to the same conclusions that this is ill-recommended legislation. This particular body has no particular responsibility to make a statement on this, what is certainly an international matter.

If this is so important to the Commonwealth of Massachusetts, why hasn't our congressional delegation acted and come forth with something in the

appropriate forum, which would be the U.S. Congress, to do something about these, no doubt, atrocities and human right abuses that have taken place in Burma.

We have no committees within this legislature that would review such matters as our essentially prohibiting our companies in Massachusetts with doing business there. We do not know how this would directly affect jobs in Massachusetts. We do not know how this would affect our export picture, which I believe the sponsors of this legislation claimed to be concerned about. Clearly, this is not a matter that's appropriate for us to take up, not now or any other time.

I also have to raise the question of it may be very well to single out South Africa, but Burma is no South Africa. As a matter of fact, I do not understand the argument as to why there aren't any number of other countries around the world where we have the same types of offenses taking place, same types of human rights abuses occurring. I do not understand the rationale of why we have to take this up, why we need to get into this matter at all.

Mr. President, I would hope that the sponsors of this legislation would

take another look at this, and for us to concentrate and focus our efforts on creating jobs here at home and not try to dabble in foreign affairs. I hope this matter is laid upon the table where it should stay.

SENATE PRESIDENT: The senator from Norfolk and Suffolk, Ms. Walsh.

MS. WALSH: Thank you, Mr. President. I can certainly understand the confusion and even the difficulty in appreciating why this matter would be before this body. And when I was first approached to sponsor this legislation, I had some of the same questions. My answer is simply this. It is a small world.

As a matter of fact, I have to speak with direct discussion of the current administration that has been so mindful and aggressive in seeking a global economy. That has had many international trips in good faith to encourage Massachusetts business arrangements, not just within the confines of the United States of America, but all over the entire globe. The fact is that we have in countries like Burma horrific serious human right violations, and that we have an opportunity through business to promote and exacerbate the most horrible dehumanization of people we can ever

imagine.

And we also have the capacity to be mindful that tax dollars in Massachusetts can either stop the violation of human rights or they can promote the protection of human rights. This legislature has had a very, very distinctive and proud history of recognizing the connection of the dots, of realizing that what Massachusetts does affects the country, affects the world. Our governor is particularly mindful of that in trying to enhance international business activities for Massachusetts.

In South Africa in the late 1980's this legislature passed similar sanctions. We educated one another, and we learned how American businesses who have contracts with the Massachusetts government are promoting atrocious human rights violations in other countries. And we became aware that we are a party and unwitting conspirator to those kinds of exploits and we pass sanctions. And those sanctions had an effect in other cities, and other states also passed sanctions.

Two years ago this legislature retreated and repealed those sanctions because the government in South Africa smelled the coffee and changed their policy and they found religion through

economic inconvenience and hardship.

The important thing about this proposal is that it recognizes human rights also. There are actually in this proposal certain exceptions. We don't prohibit medical relief. We don't prohibit news releases and other kinds of newspaper and public information. We don't prohibit any real property transactions that protect public health and public safety. It's very reason, very rational. It's an extension of our recognition of a global economy.

We also did this in Northern Ireland. It took four years, but we recognized that there are people in Northern Ireland, because of the religious affiliation who are seated beside another religious affiliation and make half the wage. Can't get a health plan. Provide and promote the same kinds of service for that community and are treated less than human. Those are the so-called McBride principles.

We recognize this government of Massachusetts subsidizes bad practices through their contracts. And we have passed a law, it's a varied version of the McBride principles, to put on notice that we are not going to promote those bad practices. And what this is, is a

message, a clear message that the government of Massachusetts will not do business with businesses that exploit and do business with military government in Burma.

This is a rational, a well grounded piece of legislation. It is authored by people who have worked formally and officially with the United Nations that have sought our help. We have much information we can offer you. This is only a debate on laying it on the table.

Furthermore, what is our role here? It is the people at the local grass roots effort that fight the wars and raise the armies. It is the states and the colonies that built this national government. It is the people closest to the pain that sometimes first rise to the solution.

I offer, as one member of this body, that we recognize the responsibility and opportunity we have to send a very appropriate and simple message to be helpful for Civil Rights across the globe with our dollars. The dollars of our government to help promote and stand for civil and human rights.

I ask for that reason that this bill that has already passed the house be

permitted to be debated and discussed here today Thank you, Mr. President.

SENATE PRESIDENT: The senator from Plymouth and Norfolk, Mr. Hedlund.

MR. HEDLUD: I hope the motion to lay on the table is not adopted, and I want to respond to a couple of points that my good friend from Wayland made.

First, she spoke of the fact that we have, as a legislative body, no role in this issue. I don't agree with that. I think the point made by my colleague from West Roxbury about our moral obligation is a valid point, and argument can be made that much of what we do in this body we have no role injecting ourselves into.

I think last week we saw legislation filed that would regulate the construction of barges which may be an interstate commerce issue that we as a state may not have a role in any say. So I think much of what we deal with -- we could have talked about tobacco labeling contents. We may not have a responsibility or role to be involved in that, but we do interject ourselves in these kinds of issues. And I think this is one that is a valid issue.

My colleague compared the situation in South Africa to that of Burma. The situation in Burma is

infinitely worse than what has gone on in recent decades in South Africa. There is no comparison.

And just a little background. There are two minorities in Burma, the Shan and the Corem, that fought with the allies in World War II, were promised support after World War II for an independent state and were betrayed by western nations. Those people have been subjected to genocides by the ruling military regime in Burma.

In fact, they have been using United States-supplied helicopters that were supposed to be used for drug eradication programs which have been turned on their own people in attempting to completely wipe out those minorities in eastern Burma. So I think it's a small, small action that this body can take but one that is warranted.

As my colleague from West Roxbury said, we got a long proud tradition. Whether it's the Fugitive Slave Acts. The legislation we dealt with last year with China, there is precedent here.

I hope the motion to lay on the table is not adopted and do debate this bill and seek passage of this bill. Thank you, Mr. President.

SENATE PRESIDENT: On the motion

to lay on the table, all those in favor say aye, opposed no. The no's have it. The motion to lay on the table does not prevail.

The question now comes on ordering the bill to a third reading. All those in favor say aye. Opposed no. The ayes have it. The bill is ordered to a third reading.

Commonwealth of Massachusetts Executive Department
Press Release

WELD, CELLUCCI SIGN BURMA BILL
First State in Nation to Impose Economic Sanctions

Governor William Weld and Lieutenant Governor Paul Cellucci today signed the Burma Bill placing Massachusetts in the lead of a growing nation-wide campaign to impose economic sanctions on Burma's tyrannical regime.

"One law passed by one state will not end the suffering and oppression of the people of Burma, but it is my hope that other states and the Congress will follow our example, and make a stand for the cause of freedom and democracy around the world," said Weld.

"Due to a steady flow of foreign investments, including those of some US companies, this brutal military regime has been able to supply itself with weapons and portray itself as the legitimate government of Burma. Today is the day that we call their bluff," said Cellucci.

The bill prohibits the Commonwealth from procuring goods or services from firms that do business in Burma. Under the new law, a list of restricted companies would be maintained by the Executive Office of Administration and Finance.

"Enactment of this legislation is a major breakthrough in Burma's struggle for freedom," said Zarni, a Burmese native and executive director of the Free Burma Coalition, responding

to Weld's bill signing. "Federal legislation is currently being debated, and Governor Weld's action at the state level sets an excellent example for other states and the Congress."

Since seizing control in 1988, the military regime of Burma has held the country in an authoritarian stranglehold. Abuses have included: arbitrary arrest and detention, forced labor, torture, and murder. In 1989, the regime arrested Nobel Peace prize winner Aung San Suu Kyi, an outspoken leader of the pro democracy movement and advocate of an economic boycott against Burma. In addition, the military party voided the 1990 elections, after gaining only 2.1 percent of the legislative seats, and arrested hundreds of the democratically-elected officials.

Massachusetts is the first state to enact a selective purchase law against Burma, but several cities have taken similar action, including: Berkeley, CA; Santa Monica, CA; San Francisco, CA; Oakland, CA; Madison, WI; and Ann Arbor, M I.

"This bill gives hope to the people in Burma who are currently being oppressed and silenced," added Zarni.

Commonwealth of Massachusetts Procurement Policies and Procedures Handbook, pg. 98

Reviewing Bidders For Burma Connections - The Burma Statute -Application Of The Restricted Purchase List To Procurements

In passing the Burma Statute in 1996 (Massachusetts General Law Chapter 22 Sections 22G-M), the Commonwealth, through its Legislative and Executive Branches, expressed its clear preference against doing business with those entities that do business in Burma (also named Myanmar). This is due to the violations of human rights by the government of Burma.

To accomplish this as it applies to our procurement activities, OSD has established and maintains a restricted purchase list as required by the Statute listing those entities which are doing business in Burma. This list is available on the OSD Homepage at http://wwwmagnet.state.ma.us/osd. This list is updated quarterly by OSD.

In all procurements, the Procuring Department should check the list to determine which Bidders are on the list. The Responses (bids) of those Bidders that are on the list are then modified by adding a premium of 10% to their Response and the resulting modified Response is used as the basis for comparing Responses. Only if the Response with the 10% premium added still provides Best Value in comparison to other non-listed entities will it be considered for the contract award.

However, if the entity which is listed as doing business in Burma does get the contract award, the prices originally bid shall form the basis of the contract, not the premium-added Response. If any Bidder insists that it should not be on the restricted purchase list, they should be referred to OSD Legal staff for appropriate action.

NFTC Council Highlights
(August 9, 1996)

NFTC OPPOSES BURMA LEGISLATION PASSED BY SENATE -- Before recessing on August 2, the Senate amended the Foreign Operations Appropriations bill requiring the President to prohibit new U.S. company investment in Burma if the government re-arrests or harms opposition leader Daw Aung San Suu Kyi or commits large-scale repression or violence against the democratic opposition. This amendment, sponsored by Senator Cohen (R-ME), and co-sponsored by Senators (Chaffee (R-RI) Feinstein (D-CA) and others, was successfully substituted for a much stronger sanctions measure sponsored by Senator McConnell (R-KY). The amendment requires the President also to try to develop a multilateral policy in coordination with members of ASEAN and other countries trading and investing in Burma, but it does not make the new investment ban contingent on multilaterl agreement. It was therefore opposed by the NFTC even though it was preferable to the McConnell amendment. The bill now goes to a Senate-House conference, members of which were appointed by the leadership before recess anbd which will most likely meet the second week of September. The NFTC will lobby the conference to accept the House version of the Foreign Operations Approproations bill since it has no language on Burma.

FOLEY, HOAG & ELIOT LLP

November 8, 1996
Mr. Philmore Anderson, III
State Purchasing Agent
Department of Procurement & General Services
One Ashburton Place, 10th Floor
Boston, MA 02108

Dear Philmore:

Enclosed please find the original Affidavit of Paul Carmichael, Acting General Counsel of Apple Computer, Inc., on behalf of the company. As you can see, the Affidavit makes clear that Apple has suspended all business with Burma except that which is expressly necessary to service prior contracts and has made clear its intention to forego all future product sales or services to Burma so long as Chapter 130 is in effect. I trust this information is sufficient to prevent Apple's appearance on the Commonwealth's restricted purchase list. Thank you again for your procedural advice in this matter and please let me know if I can provide any additional information to you.

Best regards,

/s/ Gloria C. Larson

cc: Charles Beard, Esquire

AFFIDAVIT OF PAUL CARMICHAEL
ON BEHALF OF APPLE COMPUTER, INC.

I, PAUL CARMICHAEL, BEING DULY SWORN, DEPOSE AND SAY:

1. My name is Paul Carmichael. My business address is 20400 Stevens Creek Blvd., Cupertino, CA 95014. I am the acting general counsel of Apple Computer, Inc. ("Apple"), and submit this affidavit on Apple's behalf. All of the matters stated in this affidavit are true of my own knowledge, except any matters stated as based on information and belief, and, as to those matters, I believe them to be true.

2. This affidavit constitutes Apple's response to the letter of October 7, 1996, from Philmore Anderson, State Purchasing Agent, to Apple's Chief Executive Officer, concerning AN ACT REGULATING STATE CONTRACTS WITH COMPANIES DOING BUSINESS WITH OR IN BURMA (MYANMAR) ("the Statute").

3. Apple and its subsidiaries' primary lines of business are the manufacture and sale of computer hardware, the publishing and sale of computer software, and the furnishing of services beneficial to the purchasers of, and others who maintain, the hardware and software. Neither Apple nor anysubsidiary [sic] has a place of business in Burma, and there have not been any known transactions in which Apple or any subsidiary of Apple has itself sold products or services in Burma. Before September 10, 1996, however, Apple and certain of its subsidiaries distributed computer hardware, computer software, and certain support services into Burma through independent

distributors, which caused such products to be delivered or utilized in Burma.

4. On or about September 10, 1996, Apple and its subsidiaries suspended all trading in Burma, except what was explicitly required to meet warranty and service obligation under existing contracts, which will not be renewed as they expire. Since September 10, 1996, Apple and its subsidiaries have not sold any hardware or software for delivery in Burma, nor have they offered or implemented any new services within Burma. Further, since that date, Apple and its subsidiaries have canceled pending orders requiring delivery of products to Burma.

5. Apple and its subsidiaries have no intention to sell or ship any products into, or offer any new services within, Burma, directly or indirectly, so long as the Statute's present requirements remain in effect, except when required to meet existing contractual warranty and service obligations. Accordingly, Apple asserts that it is full compliance with the Statute and that Apple does not now meet the criteria for inclusion on the restricted list required to be established under the Statute. Executed under penalty of perjury this 7th day of November, 1996, at Cupertino, California.

/s/

Paul Carmichael

/jurat omitted/

Philips International B.V.

The Commonwealth of Massachusetts
Executive Office for Administration and Finance
Operational Services Division
One Ashburton Place
Boston, MA 02108-1552
U.S.A.
Attn. Mr. Secretary
CLD/PP/LW

November 11, 1996

Re.: State Restricted Purchase List; your letter of October 7, 1996.

Dear Mr. Secretary,
Attached please find our answer to the above letter, requesting you to confirm that our company does not meet the criteria for being placed on your Restricted Purchase List.
Sincerely,
PHILIPS INTERNATIONAL B.V.
P.M.A.L. Plompen
Senior Director of Legal Affairs
Secretary of the Company
cc.: -Investor Responsibility Research Centre
-Philmore Anderson, State Purchasing Agent

/jurat omitted/

PHILIPS

The Commonwealth of Massachusetts
Executive Office for Administration and Finance
Operational Services Division
One Ashburton Place
Boston, MA 02108-1552
U.S.A.
Attn: Mr. Secretary

November 11, 1996

The undersigned, P.M.A.L. Plompen, herewith declares as follows.

I have investigated whether indeed Philips Electronics Ltd. recently appointed Maymo Import Export (Myanmar) Ltd. as the Burmese distributor of Philips' business electronics, communication and security and office automation products, as mentioned in the annex to your letter of October 7, 1996 to Philips Electronics N.V.

On the basis of the information provided to me I herewith represent that Philips Electronics N.V. has never concluded a distributor agreement as mentioned above; Philips Electronics (Thailand) Ltd. did negotiate a distribution agreement as mentioned above.

As the attached Notice shows, said agreement has been canceled; formally termination will be effective on December

4, 1996 (annex 1). Philips Electronics (Thailand) Ltd. furthermore has informed us that under said agreement no business transactions have been, nor will be, concluded and/or implemented by them.

I would welcome receiving your confirmation that under the circumstances described above our company does not meet the criteria for being placed on your Restricted Purchase List.

Copy of this letter will be sent to the IRRC with the request to withdraw our company from its listing of Multinational Businesses in Burma (Myanmar).

Signed by:
P.M.A.L. Plompen

Senior Director of Legal Affairs
Secretary of the Company
Philips International B.V.
/jurat omitted/

PHILIPS

November 4, 1996

Maymyo Import Export (Myanmar) Ltd.
Wizaya Plaza, 226 U Wizara Road,
Dagon Township, Yangon, Myanmar
Attn: Mr. Maung Kyaing
Managing Director
Subject : Notice of Intent Cancellation of Distribution Agreement

Dear Sir,

Refer to the Distributor Agreement made between Philips Electronics (Thailand) Ltd. and Maymyo Import Export (Myanmar) Ltd., dated 29th May 1996.

By virtue of Article 10.1 Termination (b) we would like to give this notice of intent to cancel the referred Agreement to be effective by 30 days after your receipt of this notice.

We would appreciate if you could indicate your concurrence with the requested cancellation by counter signing the enclosed duplicate of this letter and returning it to the undersigned.

Yours sincerely,
Philips-Electronics (Thailand) Ltd.
Robert Martjnse
Chairman & Managing Director

Read and Agreed

Maymo Import Export (Myanmar) Ltd.
/s/

HEWLETT PACKARD

November 19, 1996
Mr. Philmore Anderson
State Purchasing Agent
The Commonwealth of Massachusetts
Executive Office for Administration and Finance
Operational Services Division
One Ashburton Place
Boston, MA 02108-1552

Re: Doing Business in Burma (Myanmar) -your letter dated October 7, 1996

Dear Mr. Anderson:

Regarding your above referenced letter which has been forwarded to me for response, Hewlett-Packard Company (HP) does not concur with your decision to place HP on the list of companies doing business with or in Burma (Myanmar). HP does not believe that our company or its activities meet any of the criteria under the "Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)."

The information which was reported in the Investor Responsibility Research Center's (IRRC's) August 1996 listing of multinational[sic] Business in Burma (Myanmar) is based on an article in a Myanmar newspaper announcing Myanmar Computer Systems as a distributor of HP products in Myanmar. Myanmar Computer Systems is a Singapore owned and registered company. While HP does have an agreement with this company, this relationship does not meet the definition

under Section 22G(b) of the Act which prohibits "distribution agreements...in Burma (Myanmar)" as neither the agreement nor the Company is in Burma (Myanmar). All of HP's business activities with MCS, including HP delivery of its products, occurs in Singapore as well.

To insure that there is no confusion over whether any of HP's activities could constitute doing business in Burma (Myanmar) under the Act, HP is in the process of terminating its agreement with Myanmar Computer Systems. (The termination should be effective in the next couple of weeks.) However, this does not guarantee that HP products will not be distributed or sold in Burma (Myanmar) as HP cannot prevent the sale of our products from independent companies with which HP does not have a contractual relationship and which do not receive the products from HP directly.

Based upon the above and the enclosed affidavits, HP respectfully requests that HP's name not be placed on the Commonwealth's list of companies doing business with or in Burma (Myanmar).
Please call me at (508) 659-2077, if you have any questions.

Very truly yours,
HEWLETT-PACKARD COMPANY
Robert J. Chwaliszewski
Regional Counsel

District of Columbia, ss.

Affidavit of James F. Whittaker

James F. Whittaker, of full age, being duly sworn, upon his oath deposes and says:

1. I am employed at Hewlett-Packard Company as International Public Policy Manager, Corporate Government Affairs, and have held this position for approximately 7 years, my total length of service with Hewlett-Packard.

2. One of the responsibilities of my current position is involvement with state and local legislation affecting HP's international trade. In particular, I have been involved with reviewing Hewlett-Packard's compliance with the Massachusetts' statute entitled "An Act Regulating State Contracts Doing Business With or In Burma (Myanmar)".

3. As part of my involvement with Hewlett-Packard's compliance with the Act, I have been in contact with Kean-Huat Cheah, General Manager for Hewlett- Packard Singapore and Dick Warmington, Managing Director, Asia-Pacific, for Hewlett-Packard, both of whom are knowledgeable about Hewlett-Packard's business activities in the Far East, including Singapore and Burma (Myanmar). These individuals told me that Hewlett-Packard has no direct sales activities in Burma (Myanmar). They also informed me that Hewlett-Packard Singapore has a distribution agreement with Myanmar Computer Services (MCS). They further advised me that MCS is a Singaporian owned and registered

joint venture company and that any HP business activity relating to the sale of HP products, including delivery, to Myanmar took place in Singapore.

4. I have also had communications with Lee Ting, Vice President and Managing Director of Geographic Operations for Hewlett-Packard regarding the Act and Hewlett-Packard's business activities relating to Burma (Myanmar). Mr. Ting informed me that in reaction to the Massachusetts' Act Hewlett-Packard Singapore would terminate the agreement with Myanmar Computer Services. Based on my communications with Mr. Kean-Huat, it is my understanding that Myanmar Computer Services has been notified of the termination, and that it will be effective in the next few weeks. Signed to the best of my knowledge, information and belief under the pains and penalties of
perjury. /s/ James Whittaker
/jurat omitted/

Commonwealth of Massachusetts ss:
Affidavit of Robert Chwaliszewski
County of Essex

Robert Chwaliszewski, of full age, being duly sworn, upon his oath deposes and says:

1. I am employed at Hewlett-Packard Company in Andover, Massachusetts, as an in-house attorney and have held this position for over seven years.

2. On or about October 25, 1996, I called the Investor Responsibility Research Center (IRRC) in Washington, DC in order to determine the information the IRRC reported to the Commonwealth of Massachusetts concerning Hewlett-Packard's business activities in Burma (Myanmar).

3. I spoke with two individuals at the IRRC who informed me that the only information the IRRC had on Hewlett-Packard's activity in Burma (Myanmar) was an article from a Myanmar newspaper. This article announced that Myanmar Computer systems was a distributor of Hewlett-Packard products in Burma (Myanmar).

Signed to the best of my knowledge, information, and belief under the pains and penalties of perjury.

/s/ Robert J. Chwaliszewski /jurat omitted/

EUROPEAN UNION
DELEGATION OF THE EUROPEAN COMMISSION

January 23, 1997

The Honorable William F. Weld
Governor of Massachusetts
State House, 360
Boston, Massachusetts 02133
FAX: (617)727 9725

Dear Governor Weld,

Permit me to send you the attached note verbale which we presented to the US Department of State today with reference to the Massachusetts law enacted in June 1996 - An Act Regulating State Contracts With Companies Doing Business With Or In Burma. The US Government will already have alerted you about this matter.

As you can see from the note, the European Community objects to this legislation as we view it as a breach of the rules for procurement, which includes in its coverage, on the US side, the state of Massachusetts.

I would like to take this opportunity to emphasise that our objections to this Act pertain solely to what we perceive as a breach of US international obligations. With regard to Burma, let me assure you that the European Union shares US concerns

about the absence of democratisation and continuing human rights violations in Burma. To illustrate this, I also enclose a "Common Position" on Burma, adopted by the Council of the European Union and in effect since October 29, 1996, which outlines measures we have taken vis-a-vis Burma.

We urge you to analyse the effect of this type of legislation, as it presents, in our view, a breach of US international obligations and as such could have a damaging effect on bilateral EU-US relations. We also urge you to take this into consideration as we understand that similar legislation on Indonesia will be reintroduced in the Massachusetts legislature.

Sincerely,

/s/
Hugo Paemen
Ambassador

EUROPEAN UNION
DELEGATION OF THE EUROPEAN COMMISSION

The European Commission presents its compliments to the Department of State with reference to the *Act Regulating State Contracts with companies doing business with or in Burma (Myanmar)* enacted on 25 June 1996 by the Commonwealth of Massachusetts. [1996 Mass. ALS 130, 1996 Mass. Adv. Legis. Serv. 130; 1996 Mass. H.B. 2833].

This legislation forbids Massachusetts' state agencies, state authorities, the House of Representatives or the State Senate to sign new contracts or renewals of existing contracts with companies doing business with or in Burma.

The European Community is of the opinion that the above mentioned legislation is a breach of the rules for procurement procedures as stipulated in the Agreement on Government Procurement (GPA). Firstly, it violates Article VIII(b) of the GPA, given that it imposes conditions on a tendering company which are not essential to ensure the firms capability to fulfill the contract. Secondly, it infringes Article X(3) of the GPA, because it imposes qualification criteria based on political, rather than economic considerations. Thirdly, it is in contradiction to Article XIII (4) of the GPA to the extent that the statute allows the award of contracts to be based on political instead of economic considerations.

When concluding the GPA, the US accepted to cover the state of Massachusetts under its offer of sub-federal agencies in order to balance the EC's offer to the US. By limiting access of

European suppliers to the procurement of Massachusetts' state agencies, state authorities, the House of Representatives or the State Senate, the USA is reducing its GPA offer.

Furthermore, it appears that several other sub-federal authorities have adopted or are adopting legislation or ordinances with a similar effect. The state of Massachusetts is also considering similar measures with regard to another country besides Burma. We underline that these types of sub-federal actions reduce the US offer under the GPA or affect the way special or exclusive rights are attributed.

The European Community requests the US government to transmit its concern to the State of Massachusetts. The European Community also wishes to know what action, if any, the US Government intends to take in response to the Massachusetts measure. Furthermore, the European Community fully reserves its rights under the WTO dispute settlement procedure.

The European Community avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, DC

January 22, 1997

Department of State
Washington, DC 20520

EUROPEAN UNION
Brussels, 25 October, 1996
THE COUNCIL
COMMON POSITION

defined by the Council on the basis of Article J.2
of the Treaty on European Union, on Burma/Myanmar

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article J.2 thereof,

HAS DEFINED THE FOLLOWING COMMON POSITION;

1. The European Union, considering the recent discussions with Burma/Myanmar at meetings in Jakarta and New York, is disappointed at the unwillingness of the State Law and Order Restoration Council (SLORC) to enter into a meaningful dialogue with it. The European Union reaffirms its determination to resume such dialogue at any time.

2. The European Union is concerned at the absence of progress towards democratisation and at the continuing violation of human rights in Burma/Myanmar. It deplores, in particular, the practice of torture, summary and arbitrary executions, forced labour, abuse of women, political arrests, forced displacement of the population and restrictions on the fundamental rights of freedom of speech, movement and assembly. It condemns the detentions in May and September 1996 of members and supporters of the National League for

Democracy (NLD). It calls for the immediate and unconditional release of all detained political prisoners. The NLD and other legitimate political parties, including those from ethnic minorities, should be allowed to pursue freely their normal activities. It calls on the SLORC to enter into meaningful dialogue with pro-democracy groups with a view to bringing about national reconciliation.

3. The European Union recalls its great concern at the failure of the SLORC to respect the results of the May 1990 elections and the subsequent maintenance of the military rule. It notes that the military regime has yet to demonstrate convincingly its intention to establish civilian democratic rule, within a credible time-frame. In addition, the European Union notes the failure of the SLORC to demonstrate any willingness to respond to the concerns of the united Nations General Assembly and the European Union.

4. The European Union recalls that it has already requested the Special Working Group on arbitrary detention and imprisonment to visit Burma/Myanmar, the UN High Commissioner for human rights to take action against Burma/Myanmar, and the Special Rapporteur on Burma/Myanmar to investigate the circumstances leading up to, and surrounding, the death of Mr. James Leander Nichols.

5. With a view to promoting progress towards democratisation and securing the immediate and unconditional release of detained political prisoners, the European Union

(a) reaffirms the following measures already adopted:

(i) expulsion of all military personnel attached to the diplomatic representations of Burma/Myanmar in Member States of the European Union and withdrawal of all military personnel attached to diplomatic representations of the Member States of the European Union in Burma/Myanmar;

(ii) an embargo or arms, munitions and military equipment[1] and suspension of non humanitarian aid or development programmes. Exceptions may be made for projects and programmes in support of human rights and democracy as well as those concentrating on poverty alleviation and, in particular, the provision of basic needs for the poorest section of the population, in the context of decentralised cooperation though local civilian authorities and Non-Governmental Organisations.

(b) introduces the following, additional measures:

(i) ban on entry visas for senior members of the SLORC and their families;

---

[1] The aforementioned embargo covers weapons designed to kill and their ammunition, weapon platforms, non-weapon platforms and ancillary equipment The embargo also covers spare parts, repairs, maintenance and transfer of military technology. Contracts entered into prior to the date of entry into force of the embargo are not affected by this common position.

(ii) ban on entry visas for senior members of the military or the security forces who formulate, implement or benefit from policies that impede Burma/Myanmar's transition to democracy, and their families; and

(iii) suspension of high-level bilateral governmental (Ministers and Officials at the level of political director and above) visits to Burma/Myanmar.

6. The implementation of this common position will be monitored by the Council, to which the Presidency and the Commission will regularly report, and will be reviewed in the light of developments in Burma/Myanmar. Further measures may need to be considered. In the case of a substantial improvement of the overall situation in Burma/Myanmar, not only the suspension of the aforementioned measures, but also the gradual resumption of cooperation with Burma/Myanmar will be considered, after careful assessment of developments by the Council.

7. This Common Position shall take effect on 29 October 1996 for a renewable six months period.

8. This Common Position shall be published in the Official Journal

Congress of the United States
House of Representatives
Washington, DC 20515

February 3, 1997

His Excellency
Ryutaro Hashimoto
Prime Minister of Japan
Tokoyo, Japan

Dear Prime Minister Hashimoto,

As members of the U.S. Congress from the State of Massachusetts, we are extremely disappointed by the Japanese government's recent comments regarding the State's new law which denies state contracts to companies doing business in Myanmar -- a country that flagrantly continues to violate the most basis human rights of its citizens.

We are wholly supportive of fostering good relations between Japan and the United States, and we believe a strong relationship is critical to the futures of both nations. However, we do not believe it is appropriate for the government of Japan to involve itself in the internal affairs of Massachusetts. If the Japanese government chooses to place dollars ahead of human rights, it has that sovereign right, but Japan should not attempt to intimidate Massachusetts into changing the standards it has established for doing business with the state government. Therefore we strongly urge the government of Japan to end its opposition to this law and drop any challenge of it is the World

Trade Organization.

We appreciate your immediate attention to this matter.

Congressman Barney Frank
Congressman Edward Markey
Congressman John Joseph Moakley
Congressman Joseph P. Kennedy, II
Congressman Richard Neal
Congressman John Olver
Congressman Martin Meehan
Congressman James P. McGovern
Congressman William Delahunt
Congressman John Tierney

cc: Ambassador Kunihiko Saito

BRADLEES
February 11, 1997
Mr. Philmore Anderson
State Purchasing Agent
Executive Office for Administration and Finance
Operational Services Division
One Ashburton Place
Boston, MA 02108-1552

Re: Burma

Dear Mr. Anderson:

We are in receipt of your letter dated January 31, 1997 regarding the restricted purchase list established in response to the Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar). Bradlees does not believe that it meets the criteria for being placed on the list. Therefore, enclosed pleased find an Affidavit setting forth Bradlees' position. We trust that this Affidavit is sufficient so that Bradlees will not be placed on the list.

If you require additional information or have any questions, please feel free to contact me.

Very truly yours,

Sharon Cohen Gold

/s/

AFFIDAVIT OF CAROL REED

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF NORFOLK

I, Carol Reed, hereby depose and state as follows:

1. I am a resident of the Commonwealth of Massachusetts, am over the age of eighteen and make this affidavit based on my own personal knowledge.

2. I am the Vice President of Product Development for Bradlees, Inc. and Bradlees Stores, Inc. ("Stores"). I am familiar with the day-to-day operations and policies of Stores with respect to the development and importation of goods from overseas. Stores is the operating company which develops and imports goods from overseas for the Bradlees Department Stores.

3. As of January 1, 1997, the policy of Stores prohibits any shipments from or placement of goods in Burma. As of January 1, 1997, Stores will not be importing any goods from Burma.

4. Therefore, it is the position of Bradlees, Inc. and Stores that neither company meets the criteria for being placed on the restricted purchase list established pursuant to Chapter 130 of the Massachusetts Acts of 1996, titled AN ACT REGULATING STATE CONTRACTS WITH COMPANIES DOING BUSINESS WITH OR IN BURMA (MYANMAR).

5. The Investor Responsibility Research Center has already been advised of the above policy regarding banning any importation of goods from Burma.

/s / jurat omitted/

USA*ENGAGE LETTERHEAD

April 23, 1997

The Honorable Patrick J. Kennedy
1505 Longworth House Office
Washington, D.C. 20515

Dear Congressman Kennedy:

I am writing on behalf of USA*ENGAGE, a coalition of over 450 U.S. companies, farmers and associations who are concerned about the use by the U.S. government of unilateral sanctions against other countries.

We share your concerns over the internal situation in East Timor, which is a complex problem that defied simple solutions.

Our coalition has come together out of a concern that America no longer enjoys any real influence when it practices go-it-alone diplomacy. The record of unilateral sanctions having an impact on the behavior of other governments shows no success in a world in which there are so many choices of suppliers of goods, services and military equipment and know-how. A unilateral sanction on the government of Indonesia is highly unlikely to make the Suharto government change its policies; a contrary response is more likely.

We appreciate your reaching out to the business community. We share the objectives you are seeking. We encourage you to do so in terms of ***engagement***, not of isolation. The principles that we stand for are attached. We would urge you to use them for guidance as you formulate your

options. We hope you will also engage the State Department, the Department of Defense, the Government of Portugal, the Japanese investors in East Timor and others who have an obvious stake in the issue, before settling on any particular course.

You have an opportunity to demonstrate new thinking more suited to the realities of the post-Cold War era. We look forward to a continued dialogue.

Yours sincerely,
/s/

Frank D. Kitteredge

WORLD TRADE ORGANIZATION

WT/DS88/1
GPA/D2/1
26 June 1997
(97-2641)

Original: English

UNITED STATES - MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request for Consultations by the European Communities

The following communication, dated 20 June 1997, from the Permanent Delegation of the European Commission to the Permanent Mission of the United States and to the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the United States pursuant to Article XXII of the Government Procurement Agreement (GPA) and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes regarding the Act Regulating State Contracts with Companies doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996 (Chapter 130 of the Acts of 1996). This Act provides, in essence, that public authorities of the Commonwealth of Massachusetts are not allowed to procure goods or services from any persons, whether US or foreign, who do business with Burma (Myanmar).

The European Communities consider that, as Massachusetts is covered under the US offer to this Agreement, the measure described above violates the obligations of the US under the GPA: though not necessarily exclusively, the following provisions of the GPA: Article VIII(b), given that it imposes conditions on a tendering company which are not essential to ensure the firms capability to fulfill the contract; Article X as it imposes qualifications criteria based on political rather than economic considerations, and Article XIII to the extent that the statute allows the sward of contracts to be based on political instead of economic considerations.

This measure also appears to nullify or impair the benefits accruing to the European Communities under this Agreement, particularly as it limits the access of BC suppliers to procurement by a sub-federal authority covered by the Government Procurement Agreement in such a way so as to result in a de facto reduction of the US sub-federal offer under the GPA.

The European Communities additionally consider that this measure has the effect of impeding the attainment of the objectives of the GPA, including that of maintaining a balance of rights and obligations.

The European Communities are also very concerned by the recent proliferation of similar initiatives taken or proposed by Massachusetts and other sub-federal authorities.

This request for consultations is without prejudice to the potential pursuit of actions under the General Agreement for

Trade in Services.

I look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.

WORLD TRADE ORGANIZATION

WT/DS95/1
GPA/D3/1
21 July 1997
(97-3107)

Original: English

UNITED STATES - MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request for Consultations by Japan

The following communication, dated 18 July 1997, from the Permanent Mission of Japan to the Permanent Mission of the United States and to the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

I hereby extend a request on behalf of the Government of Japan for consultations with the United States pursuant to Article XXII of the Agreement on Government Procurement (hereinafter the "GPA") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes regarding the Act regulating State Contracts with Companies doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996 (hereinafter the "Act"). This Act effectively prohibits the public authorities of Massachusetts, including all the executive offices covered by the GPA, from procuring goods or services from any person

contained in the restricted purchase list solely because the said person does business with or is in Myanmar.

The Government of Japan considers that the measure is inconsistent with the obligations of the United States under the WTO Agreement, including, in particular, the GPA. The provisions of the GPA with which the measure appears to be inconsistent include, but are not limited to, the following Articles: paragraph 2 of Article III, paragraph (b) of Article VIII, Article X and paragraph 4 of Article XIII.

With regard to this request, I regret to point out that the United States has given no indication of a reply to the request dated 17 March 1997 from my authorities for information pursuant to paragraphs 1 and 3 of Article XIX of the GPA. The Government of Japan has also been very concerned about the recent legislative initiatives similar to the Act, which have been taken or proposed by the sub-federal authorities in the United States.

I look forward to receiving your reply to this request and hope that you can understand the intention of my authorities to hold the consultations at the same time as the European Communities, which are already scheduled with the United States for 22 July 1997.

VENABLE
Attorneys At Law

September 23, 1997

BY FACSIMILE (617) 727-4527
AND BY FEDERAL EXPRESS
Harold Fisher, Esq.
Counsel, Operational Services Division
1 Ashburton Place, Room 1017
Boston, MA 02108

Dear Mr. Fisher:

This letter is with additional reference to my communications on behalf of Compaq Computer Corporation ("Compaq or the Company"), regarding the removal of its name from the Restricted Purchase List ("the List") maintained with respect to the Massachusetts statute ("the Statute") regulating state contracts with companies doing business in Burma.

I have enclosed a facsimile copy of an affidavit executed by Mr. Paul Chan, Vice President and General Manager, Asia and Pacific Division of Compaq which sets forth the steps that the Company has taken to completely disengage from its prior market in Burma. (I will forward the original signed copy of the affidavit to you as soon as it reaches me from Singapore.)

The contents of the affidavit shows that Compaq has no

business subsidiaries, no resellers and no sales efforts of any kind in Burma. Its prior reseller agreements with respect to Burma have expired, and it no longer otherwise sells products to end-users in Burma.

Compaq has no plans to resume its activities in Burma. We believe that Compaq's name should be removed from the List based on its disengagement from the Burmese market.

VENABLE

Harold Fisher, Esq.
September 23, 1997
Page 2

Thank you for your continuing courtesy in this matter. Please call me if you have any questions.

Very truly yours,

/s/

Thomas J. Cooper

Affidavit of PAUL CHAN

I, PAUL CHAN, declare as follows:

1. I am Vice President and General Manager, Asia and Pacific Division of the Compaq Computer Corporation ("Compaq" or the "Company"). I am providing this affidavit in support of the Division's request to have its name removed from the Restricted Purchase List, maintained with respect to the Massachusetts statute regulating state contracts with companies doing business in Burma (Myanmar).

I hereby affirm that I am authorized by the Company to make declarations and affidavits of this type.

2. Compaq was founded in 1982. The Company designs, develops, manufactures, and markets a wide range of computing products, including desktop computers, portable computers, workstations, communications products, tower PC servers, and peripheral products that store and manage data in network environments. Compaq products are sold and supported in more than 100 countries around the world.

3. Compaq generally distributes its products through third-party computer resellers, value-added resellers, dealers, and systems integrators.

4. Compaq provides support and warranty repairs to its customers through full- service computer dealers and independent third-party service companies. Compaq offers its customers a number of services and support programs, such as one to three-year limited warranties on PC products.

5. The Company began selling PC's in Burma in 1994 from its wholly-owned subsidiary in Singapore. Sales were initially made to a Singapore-based reseller, which in turn appointed a small number of dealer associates to sell products to end-user customers in Burma. This reseller subsequently transferred to a Burmese Company.

6. In 1996, Compaq directly appointed four additional resellers owned or operated by Burmese nationals to sell Compaq products in Burma.

7. Compaq allowed its contracts with all of its resellers to expire on January 31, 1997. None has been renewed.

8. Compaq continued to sell products to its resellers for resale in Burma through the first quarter of 1997, that is, through approximately March 19, 1997. These resellers were notified in March and June, 1997 that Compaq would no longer sell products in Burma.

9. The Company has never appointed or authorized any service providers in Burma. Warranty and replacement parts exchanges have been undertaken by the Company's authorized resellers in Burma. Although Compaq no longer sells its products in Burma, in order to maintain end-user satisfaction and to fulfill its warranty obligations, it anticipates the need to send replacement parts to Burma for a limited time as well as maintenance, safety, and technical service guides (the "Guides"). Based on the relatively small installed base in Burma, Compaq expects the volume of replacement parts that will actually be exchanged or sold to be quite low. In any event, Compaq will not

actively market such parts or the Guides in Burma. Rather, it intends to accept orders for such parts and Guides that may be made from time to time by prior purchasers of its products.

10. Compaq's warranty obligations with respect to end-users in Burma arose both from its prior agreements with the Burmese resellers and the limited warranty statement included in the boxes that contain products sold to end-users. Compaq's standard reseller contract contains a provision stating that its products carry the warranty set forth in the limited warranty statement that accompanies each Compaq product and the warranty statement commits Compaq contractually vis-a-vis the end-user customers. As noted above, Compaq allowed its contracts with its resellers in Burma to expire on January 31 of this year. However, the warranty obligations remain in effect because they are continuing obligations under those contracts with respect to the resellers, and the warranties remain effective with respect to the end-user customers.

11. Compaq will receive no revenue for any replacement parts supplied to systems previously exported to Burma. It will pay a small labor fee to the resellers for installing the parts.

12. The anticipated updates to the Guides will be provided to the former resellers without charge. End-users will receive updates only if safety issues are present.

13. Currently, Compaq has no business presents or activities of any kind in Burma. It has no subsidiaries, no resellers and no sales efforts of any kind. As noted, Compaq's reseller agreements have expired, and it no longer otherwise sells

products to end-users in Burma. Finally, the Company's residual supply of parts and Guides to end-users in Burma will be entirely passive and depend on requests from prior purchasers of products in that country.

I swear under penalty of perjury that the foregoing is true and complete to the best of my knowledge and belief.

/s/ PAUL CHAN

September 23, 1997

Notes for remarks by Byron Rushing at the Burma Seminar, Stockholm, Sweden;
Thursday, September 25, 1997

1. I first became interested in Burma in February, 1993 when I read a statement signed by Bishop Desmond Tutu and other Nobel laureates urging support for Aung San Suu Kyi. (Suu Kyi was awarded the Nobel Peace Prize in 1991.) At that time she had been nearly four years in detention.

2. SLORC has managed to survive through revenues generated by foreign investments and by a market for export of the nation's natural resources. Burton Levin, the former U.S. Ambassador to Burma, says that "foreign investment in most countries acts as a catalyst to promote change, but the Burmese regime is so single minded that whatever they might obtain from foreign sources they pour straight into the army while the rest of the country is collapsing."

3. The Commonwealth of Massachusetts has a long history of assisting fledgling, democratic movements and opposing oppressive regimes throughout the world. From our leadership in the anti-apartheid campaigns we know that local governments can act effectively as parts of grassroots foreign policy initiatives.

4. In 1994, when activists sought my support and leadership in the legislature, I had available strategies

which we had used in campaigns around South Africa and Northern Ireland. I suggested "selective purchase", a modified boycott by a local government of goods and services sold by companies doing business in Burma.

5. Considering the deterioration of human living conditions in Burma, where military generals have stolen an entire country's resources and is stealing--enslaving--its population through force--we successfully argued in the legislature--the Commonwealth of Massachusetts should not provide contracts to companies that do business with this dictatorship government. The Commonwealth joined the movement for the restoration of democracy in Burma.

6. I would like to bring you up to date on what has transpired since the enactment of the Massachusetts Burma law, Chapter 130 of the Acts of 1996. As you may recall, the bill, except for a few exceptions, bars the Commonwealth from buying goods or services from companies that do business in Burma. By so doing, we have joined an international movement for the restoration of democracy in that country, in the same way we were early supporters of the successful movement to end apartheid in South Africa.

7. The bill is having an impact. In a recent interview, Nobel Peace Prize laureate Aung San Suu Kyi, the leader of the National League for Democracy (whose party won more than 80% of the seats in the 1990 Burmese elections, but has been unable to assume its

responsibilities) singled out the Massachusetts Burma law for praise. Since the passage of our law, over 13 companies have withdrawn from Burma. We have no accurate count of how many have put off plans to enter Burma.

8. Recently, both the European Commission of the European Union and the Japanese governments have expressed their opposition to the Massachusetts Burma law. On January 22, the European Commission formally protested the Massachusetts Burma law, alleging that it violates the World Trade Organization (WTO) "Agreement on Government Procurement." Angered by this intrusion into Massachusetts State law, all ten Massachusetts Congressmen sent letters of protest to the President of the European Commission and the Japanese Prime Minister of Japan.

9. Similar Burma legislation has been adopted by ten cities and one county, and has been introduced or is now pending in five other states: California, Connecticut, North Carolina, Texas and Vermont. Selective purchasing initiatives are underway this spring in New York City and Quincy, with more cities to follow.

10. Although at this time I am not aware of any domestic efforts to have the Massachusetts Burma bill repealed, it is important for my colleagues to vigorously refute such arguments should they arise. We have encountered

such resistance before when we took actions concerning South Africa and Northern Ireland and China and have always stood our ground. This legislature must be free to demand that the highest democratic, environmental and labor standards be adhered to by the state's vendors and contractors.

11. On April 22, President Clinton announced that the Administration would ban new US investment in Burma. It is clear that President Clinton took this action for three main reasons. The most important factor in this decision was the call for sanctions by Aung San Suu Kyi and the democracy movement inside Burma. Their principled call for sanctions, despite the SLORC's brutal crackdown, laid the more foundation for President Clinton's decision.

12. Secondly, the Administration took this action in response to pressure for sanctions from Congress led by senators Mitch McConnell and Daniel Patrick Moynihan.

13. Thirdly, grassroots pressure, particularly in the form of state and local selective purchasing laws, built the political momentum for President's Clinton's decision. We in Massachusetts can be proud that we were the first state to adopt a Burma selective purchase law.

14. The Massachusetts law puts pressure on many companies in Burma which are not affected by the President's sanctions. Companies that are already

investing in Burma and foreign owned companies in Burma--if they wish to do business with the Massachusetts government and its authorities--are covered by our Burma selective purchase law.

15. There remains a need for additional selective purchase bills to be introduced and passed throughout our country. This is just one important battle won in the course of a long strategy; let us enjoy our deserved victory today and return to the advocacy tomorrow.

16. The EC is, by challenging the Massachusetts Burma law, taking political pressure off the SLORC and undercutting Aung San Suu Kyi's support for selective purchasing laws.

17. The European Free Burma groups led by Gijs Hillenius of the Burma Center Netherlands, have launched a campaign to press European governments to join the US and ban new investment in Burma. They have also worked with legislators in the European and national parliaments to make statements opposing the EC's stand against the Massachusetts Burma law.

18. The EU and Japan are engaged in actions that are "fundamentally inconsistent" with their own positions regarding Burma sanctions. Japan has called for dialogue between the military junta and the democracy movement. European support for Burma sanctions is particularly strong. Just one month ago, the European parliament passed a unanimous resolution calling on the

European Union to enact economic sanctions on Burma. In addition, the European Parliament's resolution specifically urged the European Commission not to take action against the Massachusetts Burma law under the WTO dispute settlement procedures.

19. The EU and Japan contrived WTO dispute raises critical issues regarding the jurisdiction of the World Trade Organization, state sovereignty and popular support for democracy movements overseas. Consequently, we must urge the USTR to maintain a firm stand while keeping the public fully informed of all negotiations and decisions made during the consultations and dispute resolution process.

20. The Clinton Administration has recognized the illegitimacy of the Burmese military dictatorship. In its 1997 Report on Human Rights, the U.S. Department of State reported that in 1996, "the military regime in Burma stepped up its 'rolling repression' and systematic violation of human rights," citing the killing and torture of dissidents and ethnic minorities. On April 21, 1997, President Clinton fulfilled the mandate of the Cohen-Feinstein law by imposing sanctions on Burma and restricting new U.S. corporate investment in that country. U.S. Secretary of State Madeline Albright told the leaders of ASEAN meeting in Kuala Lampur, Malaysia on July 27, 1997, "Drug money has become so pervasive in Burma that it taints legitimate investment and threatens the region as a whole." I commend the Administration for taking this

stand and believe the international community must strengthen its resolve in dealing with the Burmese dictatorship, including the forcible removal of all multinational corporations doing business there.

21. The European Union and Japanese government complaints about the Massachusetts law are without merit. The state law treats foreign-based corporations the same as it treats U.S.- based corporations. In fact, unlike the federal law, which affects only U.S. -based corporations, state and local purchasing laws are the only way to effectively pressure U.S. and foreign-based corporations equally.

22. The citizens of Massachusetts, a well as every other state, have every right to decide criteria fitting with their principles on where and how they choose to spend their tax dollars. Such decisions are part and parcel of our democratic, federal form of government. In no way can we accept interference by foreign governments or the World Trade Organization in our elected governments' ability to make these decisions. Failure to uphold the right of state and local governments to make their own purchasing decisions in this instance would harm not only the growing campaign to pressure the Burmese dictatorship but our rights as a free and democratic people.

23. In apartheid South Africa international economic pressure was effective in bringing democracy to all its citizens. As Bishop Tutu says, "International

pressure can change the situation in Burma. Tough sanctions, not constructive engagement, finally brought the release of Nelson Mandela and the dawn of a new era in my country. This is the language that must be spoken with tyrants--for, sadly, it is the only language they understand The courageous, committed witness of Bu a's democratically elected leader, Aung San Suu Kyi ... is an inspiration. We must ensure that because she out of sight, she is not therefore out of mind."

24. These first steps taken in Massachusetts, in New York City and in other municipalities begin to assure all the people of Burma that although they are out of sight of the United States, Burma is not therefore out of mind of all of us who believe in democracy.

--Byron Rushing has been a member of the Massachusetts House of Representatives since 1983. The Burma Seminar was arranged by Diakonia, The Swedish NGO Foundation for Human Rights and the Olof Palme International Center.

Testimony
October 23, 1997
House of Representatives
Ways and Means
Trade

Use and Effect of Unilateral Trade Sanctions

TESTIMONY FOR
UNDER SECRETARY EIZENSTAT
BEFORE THE
TRADE SUBCOMMITTEE
HOUSE WAYS AND MEANS
OCTOBER 23, 1997

Mr. Chairman and Members of the Committee, thank you for this opportunity to testify before you on the use and effect of unilateral trade sanctions.

Mr. Chairman, the view that I would like to lay before you today is that the record is clear. Properly designed, implemented, and applied as part of a coherent strategy, sanctions, including economic sanctions, can be and are a valuable tool for enforcing international norms and protecting our national interests. In this age of increasing globalization we have turned more frequently to sanctions to deal with inappropriate or unacceptable behavior by states. We should improve our ability to use them effectively. They should be used only when carefully considered by both the Executive and Legislative branches as to their likely effectiveness, after all

benefits, costs, and consequences are analyzed, and after the full range of diplomatic and political options has been attempted to change the conduct in question by the target country or group.

Sanctions, especially multilateral sanctions, have been effective. Iraq, Libya, former Yugoslavia, Haiti and others provide examples. But at the same time, a realistic appraisal of our experience has taught that sanctions are not a panacea and they are not cost-free. Our object must be to learn from our growing experience, to draw the appropriate lessons so that we can find the best, the most effective way to employ this potentially powerful tool while minimizing the adverse costs.

Some things are clear. We should resort to sanctions only after other appropriate diplomatic options have been aggressively pursued and have failed, or would be inadequate. Sanctions are much more likely to be effective when they have multilateral support and participation. Multilateral sanctions maximize international pressure on the offending state while minimizing damage to U.S. competitiveness and more equitably distributing the sanctions burden across the international community. There are times, however, when the stakes are high, when important national interests or core values are at issue, that we must also be prepared to act unilaterally. Before imposing unilateral sanctions, serious thought must be given to all the potential ramifications.

In many instances, engagement can be preferable to isolation although the choice is not always so stark. In some cases, a mixed policy approach that incorporates both carrots and sticks may be appropriate. Engagement, including engagement by the US business community, may contribute a positive influence. In the case of some rogue regimes, however, engagement would simply feed the regime's appetite for inappropriate or dangerous behavior. Most importantly, there can be no "one-size fits all" approach. The President must have the flexibility to tailor our response to specific situations.

* * *

Mr. Chairman, the general concept of sanctions is not new; the idea is as old as society itself. In their work "Economic Sanctions Revisited" authors Hufbauer, Schott and Elliott cite the imposition of a trade embargo by the Athenian leader Pericles on neighboring Megara in approximately 432 BC in retaliation for Megara's attempted expropriation of territory and the kidnapping of three women. In 1812 the United States imposed an embargo on Great Britain in retaliation for British attempts to limit US trade with France. In 1917 President Wilson imposed an embargo on the sale of iron, steel and other war essentials to Japan. President Roosevelt also imposed economic sanctions on Japan in 1940. I was personally involved in the use of sanctions against the former Soviet Union following its invasion of Afghanistan during my service in the Carter White House. So the use of sanctions in pursuit of foreign policy objectives is not new.

We, however, are living in an age of heightened political and economic global integration and growing interdependence in which most countries derive their prosperity, and even

power, from growing engagement in the international economy. In such a world, sanctions are an important and potentially effective, if problematic, tool for enforcing international norms and standards of behavior, mediating not only between differing countries, but in the relationship between individual states and their own citizens as well. Sanctions are also a tool, however, which bring with themselves real costs as well as potential benefits.

The frequency with which we turn to sanctions has increased dramatically, particularly since 1990. The U.S. has applied sanctions for foreign policy purposes a total of 115 times since World War I, 104 times since World War II, and according to the count of the President's Export Council, 61 times since. 1993. Thus more than half the sanctions imposed in the past 80 years have been imposed in only the past four years. These figures do not include the increasing use of sanctions at the state and local levels.

In the UN, the Security Council imposed sanctions only twice between 1945 and 1990: Rhodesia and South Africa. Since 1990, however, the UN has imposed mandatory sanctions on 8 countries: Iraq for its invasion of Kuwait; Serbia for its use of force in former Yugoslavia; Libya in reaction to the PanAm 103 massacre; Somalia and Liberia in their civil strife; Rwanda for genocide; Haiti for abrogation of democracy; and Angola during a renewed insurrection. Just within the past few weeks the UN has threatened further tightening of existing sanctions in UNITA, and imposed sanctions on the revolutionary junta in Sierra Leone.

Others have also resorted to sanctions. The EU, Japan and Canada have joined us in imposing sanctions on Burma. The EU is withholding aid from Kenya until that country deals with problems of corruption and rigged elections. The IMF has also moved to condition its lending to Kenya on serious efforts to deal with problems of pervasive corruption. The East African states imposed sanctions on Burundi, the Economic Community of West African States (ECOWAS) on Sierra Leone, and the Association of South-East Asian Nations (ASEAN) on Cambodia.

Sanctions are used for a variety of purposes:

- to punish a country for unacceptable behavior;
- to influence the behavior of a target country;
- to signal disapproval of a government's behavior;
- as a necessary early reaction and as a warning that harsher measures--even military--could follow;
- to limit a target state's freedom of action; to deny resources or technology;
- to increase the cost of engaging in unacceptable behavior; to draw international attention to unacceptable behavior;
- to challenge our allies to take more forceful action themselves in support of common objectives;
- or at times, simply to signal that a business-as-usual approach to a government that violates core values is not acceptable.

We also use sanctions in pursuit of a large number of policy objectives. These include such things as support for human rights, including workers and religious rights, promotion of

democracy, to combat terrorism or the scourge of narcotics, in support of weapons of mass destruction and conventional non- proliferation or protection of the environment.

We have available a broad array of policy measures. These include not only punitive or coercive economic measures but political and military steps as well. These may range from simple measures such as a change in the level and size of diplomatic missions to the ultimate sanction, application of military force, with many possible stops in between. The Secretary's Advisory Committee on International Economic Policy has developed an "Illustrative Matrix of Foreign Policy Tools" including possible diplomatic, political, cultural, economic and military measures ranging from friendly persuasion, including positive inducements, to hostile or coercive steps. This matrix offers a response ramp of measures from which one could select appropriate tools for seeking to change the behavior of states that violate international norms.

We must be frank to recognize that in today's interdependent, global economy, the ability of the US to unilaterally deny key economic benefits to a target country is limited. Nevertheless, there are some measures which are not subject to foreign substitution, such as denial of a US quota, withdrawal of port privileges or landing rights, and actions in international financial institutions, consistent with their own rules, to withhold loans and assistance.

In any event, it is not always easy for us to agree whether specific sanctions have been effective. How we judge the effectiveness of sanctions depends on the desired results--

overthrow of a government (in which case anything other than the application of military force is likely to be ineffective by itself); changes in a regime's behavioral patterns by increasing the cost of doing business (by deferring investment, deterring trade and the like where multilateral sanctions are likely to be most effective); or simply as a means of expressing moral or other outrage at what we consider unacceptable behavior.

There is no single, common standard against which to measure success or failure. The standards proposed by a firm dependent on sales to Burma (where we imposed targeted unilateral sanctions) would certainly differ from those applied by a committed human rights activist who oppose any interaction that might legitimize or strengthen the position of the authorities. The lower the expectations set for what sanctions are intended to accomplish, of course, the more likely the judgment is to be positive and, perhaps, the greater the willingness to bear the costs imposed on the country imposing sanctions.

One thing is clear: sanctions are an important potential tool but are not a panacea and they are not without costs. Sanctions do offer, however, important levers for behavior modification and will continue to do so. There is one common thread: the sanctions which are most likely to be successful are multilateral ones in which a significant number of countries with economic and political clout have agreed. These also impose fewer burdens on the US business community since the companies of a significant number of countries will be required to forswear doing business with the target country.

Multilateral sanctions on South Africa were certainly a major contributor to bringing down apartheid. In Iraq, multilateral sanctions have blocked Saddam Hussein's access to the resources needed to rebuild his war machine and, even worse, restock his arsenal of non-conventional weapons. In Libya, UN sanctions have made Qaddaffi pay a heavy price for failing to turn over for trial those indicted for the massacre of PanAm 103. In Serbia, sanctions, backed up by the very real threat of military reversals for the Bosnian Serbs, clearly brought Milosevic to the negotiating table in Dayton.

There are examples of unilateral sanctions which have been effective or which have served as an encouragement to others to take action. The sanctions the United States imposed on Burma called increased international attention to human rights abuses by the ruling regime. The Europeans, Canadians and Japanese have now also imposed sanctions or withdrawn benefits. Even in Cuba, while Castro remains in power, US sanctions have discouraged foreign investment and increased pressure on the regime to adopt reforms. In other areas such as the effort to combat the source of drugs, the use or threat of unilateral sanctions has proven to be an effective tool.

In general, however, such cases tend to be fewer in number and generally restricted to those instances where we have overwhelming economic or political leverage.

Nonetheless, it is often important to show US leadership in isolating regimes or governments whose actions violate international norms. The repressive Castro regime, the last dictatorship in the hemisphere, is such a case. The greatest

challenge is to develop common policies with our allies to deal with such regimes.

Unilateral sanctions are not only less likely to be successful than multilateral, they also impose costs, which must be honestly recognized. For one thing, the unilateral nature of many of our sanctions efforts has embroiled us in differences with key allies that detract from the desired results.

Unilateral sanctions are also now being imposed on countries by US states and localities--such as New York City and the State of California's actions against Swiss banks, or the sanctions imposed by Massachusetts on Burma. While the latter were adopted in pursuit of a noble goal, the restoration of democracy in Burma, these measures also risk shifting the focus of the debate with our European Allies away from the best way to bring pressure against the State Law and Order Restoration Council (SLORC) to a potential WTO dispute over its consistency with our international obligations. Let me be clear. We are working with Massachusetts in the WTO dispute settlement process. But we must be honest in saying that the threatened WTO case risks diverting United States' and Europe's attention from focusing where it should be--on Burma.

The actions against Swiss banks are counterproductive, failing to recognize the real progress made by Switzerland in dealing with its past conduct during WWII, and discouraging further cooperation to right the wrongs of the past.

While state and local governments should express the

democratic will of their citizens, unless sanctions measures are well conceived and coordinated, so that the United States is speaking with one voice and consistent with our international obligations, such uncoordinated responses can put the US on the political defensive and shift attention away from the problem to the issue of sanctions themselves.

Questions have been raised about the constitutionality of state sanctions, and I am not here to debate that issue. But from the perspective of the Department of State, we are concerned about the impact of state and local sanctions on the President's ability to send a clear and unified message to the rest of the world. As the world's only economic and military superpower, the United States has the obligation to project a coherent and consistent message to oppressive regimes. Ad hoc and scattered actions at various levels of government, however well-intentioned, can do more harm than good in achieving the desired objective and impede the President's and Secretary of State's conduct of foreign policy. It is the Executive Branch of the US Government which is charged with conducting the nation's foreign policy, in consultation with the US Congress, not states and municipalities. We should have only one foreign policy at a time.

We are working with Massachusetts, and with other state and local governments which have implemented or are considering the imposition of various sanctions measures, to try to ensure that they are designed so that they do not conflict with our international obligations and work to advance rather than retard progress toward meeting our foreign policy objectives.

Unilateral sanctions in particular also have real costs to US business and American workers. A number of organizations have recently released different studies of the cost and effectiveness of sanctions, including the President's Export - Council, the National Association of Manufacturers, the European-American Business Council, the United Nations Association of the United States, the Secretary's Advisory Committee on International Economic Policy, and the Carnegie Foundation. Others are engaged in on-going studies on sanctions, such as the Center for Strategic and International Studies. USA*ENGAGE has been formed with over 600 US member companies solely for the purpose of dealing with the sanctions issue from an American business perspective.

Most of these studies reach similar conclusions and criticisms of the current use of sanctions. According to these studies, sanctions, particularly unilateral economic sanctions, are often seen as undisciplined, poorly targeted and/or ineffective. Measures may be overly broad--like applying a meat cleaver where laser surgery would be more appropriate--and the consequences are not well thought through. Decisions to impose sanctions may be made with little or no analysis of the actual impact the proposed sanctions are likely to have on various groups within the target country, or on how economic pressure is likely to be translated into political pressure. Alternatives such as diplomatic measures, sometimes more effective, may not always be considered.

Some also argue that the cost to the US economy and US competitiveness can be disproportionate to the results achieved. The President's Export Council, for example, recently

estimated the direct cost of economic sanctions to the US economy in 1990s at $15-19 billion in lost export sales and up to 250,000 jobs. It also suggested that sanctions have an indirect effect through undermining confidence in the reliability of US suppliers and providing a competitive advantage to foreign competitors. Other studies have also pointed to lost exports and lost jobs, to cases where US components are specifically designed out of products because the producers do not wish to face the prospect of eventual restrictions on exports to particular markets, and to reports that foreign firms have intentionally switched R&D away from the US to Europe because of a desire to avoid sanctions problems.

The imposition of sanctions may also place us in difficult policy dilemmas. Would, for example, the imposition of strict sanctions on Syria, a country on our terrorist list (and with good reason), be consistent with our desire and need to engage Syria in the most cooperative way possible in seeking peace in the Middle East?

It is unfortunately also true that too often a decision to impose sanctions may be taken reactively, to demonstrate moral indignation or the resolve to be seen as doing something--without any real consideration of whether the measures imposed will be an effective means of advancing our goal and without consideration of the costs along with the benefits. H.R. 2431 (the Wolf-Specter) Freedom from Religious Persecution Act) is, we believe, as case in point. While we agree with the goal of the bill and have made respect for religious freedom a top priority in our human rights policy, as originally constituted the bill could actually undercut our efforts to promote the very

values that the bill seeks to foster: adversely impacting our diplomacy in regions from South Asia to the Middle East, and undermining our efforts to promote the very regional peace and reconciliation that can foster religious tolerance and understanding. H.R. 2431 is an excellent example of the need for the Administration and Congress to work together to craft the kind of legislation that will be effective in meeting our common goals. This is not to say that we should forswear the use of sanctions, or that sanctions are an inappropriate tool. They do have a role to play in our panoply of tools to defend US interests. There is a great need for more dialogue and engagement between the Executive and Legislative branches, more opportunity for comment by the public, and more careful attention to all the potential consequences before we leap. The issue is how we can ensure that this potentially valuable tool is an effective instrument of policy while minimizing the costs.

The studies to which I have referred generally indicate that thoughtfully designed and implemented, sanctions may be an effective policy tool. The task we face is to substantially reduce negative effects while still achieving policy goals. Critics recommended a number of both policy and process changes. These include: broader and more methodical consideration of policy alternatives, increased emphasis on multilateral sanctions, improved consultation and coordination between Congress, the Administration and State and local governments, and revisiting sanctions if the objectives are not achieved in a reasonable period of time. The mixed results of various sanctions regimes, both multilateral but especially unilateral; the lack of an agreed "standard of performance" against which to measure the utility of sanctions; the economic and other

costs imposed on those imposing the sanctions and on third countries; the differences which unilateral sanctions-with an alleged extraterritorial impact in particular have caused with our allies, who may share our objectives but disagree with our tactics; all have led to a growing number of calls to reexamine, to rethink the way in which we use sanctions. Here are some of the lessons we have learned from our growing experience with sanctions:

First, as a general rule, we should resort to sanctions only after other appropriate diplomatic options have been aggressively pursued and have failed or would be inadequate. Sanctions are, after all, only one of many measures available to us, from symbolic measures like withdrawing an Ambassador, reducing Embassy staff, to denying visas to target figures, entering into security arrangements with neighboring countries, to military intervention and everything in between. We should also not forget the power of positive inducements--rewarding desired behavior.

Second, a major objective of sanctions is to change behavior. That implies that a primary consideration in considering a sanctions regime must be whether or not the sanctions measures are indeed likely to be-effective in achieving that goal and whether they are part of an integrated strategy. Sanctions that are ineffective, that are easy to evade or avoid, that are imposed merely to "make a statement," are not only pointless in achieving our objectives, but in the longer run debase and undermine the value of sanctions as a potent foreign policy tool.

Third, we should design sanctions carefully so that, to the maximum extent possible, the target country feels the pain, not the innocent and certainly not solely our business community and citizens. Sanctions should be constructed so as to minimize the cost to the U.S. and its allies while extracting maximum leverage. Whether we act alone or in concert with others, we should analyze before we penalize, studying in advance the specific purpose, enforceability, cost and likely effect of any decision to impose sanctions.

Fourth, sanctions are much more likely to be effective when they have multilateral support and participation. Multilateral sanctions maximize international pressure on the offending state. They show unity of international purpose. And, because they are multilateral, these sanctions regimes are also more difficult to evade or avoid, while minimizing damage to U.S. competitiveness and more equitably distributing the sanctions burden across responsible countries. We should make a maximum effort to develop a multilateral sanctions regime in instances when sanctions are a viable option, and given a reasonable period of time to develop an international consensus for such sanctions.

Fifth, if we have been unsuccessful in achieving a multilateral regime, we must nonetheless recognize that, while our preference will be to act multilaterally, there are times when the stakes are so high, when important national interests or core values are at issue, that we must also be prepared to act unilaterally. Such actions must be considered, sometimes applied, if the United States is to play a leadership role. Otherwise, our ability to influence or respond to international

or regional threats will always be subject to someone else's veto. But again, primary considerations in any eventual application of unilateral sanctions must be whether they are effective, whether they are part of a cohesive strategy to change behavior, and whether they contribute to or detract from our efforts to gain multilateral support for our policy objectives. There generally should be some reasonable expectation that the sanctions will have a significant impact on those targets, and that there is some expectation they can be effectively implemented and enforced.

Sixth, we must recognize that in our democratic system the impulse to impose sanctions is by no means restricted to the Executive Branch. If our policies are to be effective, we must work together--Administration, Congress, communities at the state and local level, the business community, NGOs--to see that our use of sanctions is appropriate, coherent, and designed to attract international support. Congress should go through the same careful consideration and balancing of interests as the Executive Branch. There must be more structured, systematic discussions between the Executive Branch and Congress when sanctions are an option.

Seventh, engagement is more often better than isolation though the choice is usually not between these two extremes There are many countries which engage in certain practices or policies which we find objectionable, which we seek to change. We need to tailor our approach, whether carrots or sticks or a mix of the two, to fit the individual target. In many cases, engagement at every level may be a better, a more effective way to achieve our intended result. In such cases, engagement,

including engagement by the US business community, will contribute a positive influence. Cutting off dialogue and engagement with those countries would be counterproductive. In other countries, critical US interests may be so involved that isolation is simply not an option, as is the case with China, where not simply economic but important security interests in the Pacific are at stake. Even during the height of the so-called "evil empire," for example, the Reagan Administration sought to both engage and change the Soviet Union.

In other cases, however, the practices of a country may be so egregious, so outside the norms of international behavior, so threatening to US interests and those of our allies, that any attempt at engagement is pointless. Engagement with a country such as Iraq would simply feed Saddam Hussein's appetite for inappropriate behavior. In the case of Iran, economic pressure is one component of a policy designed to demonstrate that countries which want to benefit from full participation in the international community must abide by accepted norms of international behavior. Pending such a change, our approach limits the capacity of Iran to support terrorism or acquire weapons of mass destruction.

Eighth, the President, the custodian of the country's foreign policy under the Constitution, must be given discretion to waive sanctions in the national interest. This authority, or example in Title III of the Libertad Act (Helms-Burton) has been used effectively to help build an international consensus to take a much tougher position to encourage democracy and human rights. The Administration, which is charged with carrying out our foreign policy, must have the flexibility to

tailor our response to specific situations. There can be no "one-size fits all" approach.

Ninth, Mr. Chairman, experience has shown that the development early on of appropriate consultative mechanisms with countries which share our goals can be helpful on states of critical concern. While such mechanisms do not guarantee results, the absence of such a mechanism can almost certainly guarantee failure.

* * *

Let me turn now, Mr. Chairman, to two special cases, ILSA and the Libertad Act. I would venture to say that no nation's behavior poses a greater threat to US political and security interests than that of Iran. Iran's support for terrorism, its efforts to obtain weapons of mass destruction and the means to deliver them, and its efforts to disrupt the peace process in the Middle East are intolerable. They threaten our friends, allies, and interests in the Persian Gulf, the Middle East and beyond. As the Mykonos decision in Germany indicated, the reach of Iran's terrorist activities extends to Europe, as well. The behavior of the Iranian regime is dangerous and unacceptable. It has been for years and remains so. Even with the new government and the possibility of change which it may present, we see no sign that Iran has changed its external behavior in areas of critical concern to us and to our allies as well. It is a matter of great frustration that some of our allies do not seem to share our sense of urgency in confronting Iran's dangerous behavior and convincing the new Iranian government of the need for change.

We are not prepared to carry on business as usual with the

Iranian regime, and we feel very strongly that our friends and allies should not do so either. We supported the Iran and Libya Sanctions Act (ILSA) only after our earlier bilateral and multilateral efforts failed to produce change in Iran's behavior in areas of critical concern to us. In the case of Iran, efforts were made for years to develop a multilateral consensus inhibiting Iran's efforts to acquire weapons of mass destruction and deter support for global terrorism. They were not fully successful. Our allies have resisted trade and investment sanctions that impose economic pressure on Iran. Europe joined us in some efforts to prevent Iran from acquiring the technology and components needed to build weapons of mass destruction. Europe's "critical dialogue" was designed to engage Iran but had no apparent effect in altering its unacceptable behavior. The "critical dialogue" seemed, at times, less critical and more a design for economic benefit.

Nonetheless, the sanctions provided by ILSA are not an end in themselves, but the means to further our goal of denying to Iran the ability to carry on its highly objectionable behavior. That is why ILSA also includes a provision for a waiver of the law towards any country that agrees to undertake substantial measures, including economic sanctions, to inhibit Iran's behavior. We are committed to working with our allies in the EU and others to build an effective multilateral coalition that would increase our cooperation on Iran. European Union members, for example, believe that their existing cooperation in the various nonproliferation agreements--such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies, the Missile Technology Control Regime, and the Nuclear Suppliers,

Group--and their on-going efforts to fight international terrorism provide an adequate basis for the Administration to grant country-wide waivers. We do not. These steps are important and we should not be dismissive of them. But they are not enough. We believe that they should do more to address our common concern regarding Iran, particularly on the issues of their pursuit of long range missle capability, weapons of mass destruction, terrorism, and sales of sensitive technology, but we should not be dismissive of the steps taken so far. In the wake of the Mykonos decision, the EU has withdrawn its Ambassadors and suspended its critical dialogue, although we cannot be certain that these measures will continue. Of more lasting importance are the commitments barring arms transfers. Nevertheless , we have told the EU we will not be in a position to grant country-wide ILSA waivers based on these measures alone.

We are undertaking a thorough investigation of foreign investment in two Iranian energy projects--one in the Balal field involving the Canadian company Bow Valley and the Indonesian company Bakrie and another in the South Pars field in which the French company Total, the Russian company Gazprom and the Malaysian company Petronas are reportedly large investors. We are making every effort to gather as expeditiously as possible the necessary information to establish whether sanctionable activity under ILSA has occurred. Since we take the possibility of sanctions very seriously, we want the information on these cases to be as complete and accurate as possible. While we have not made any final decision, we are committed to fully implementing the law.

Our Cuba policy is illustrative of one of the principal goals of economic sanctions--to encourage our friends and allies to adopt policies that can advance our common interests. Our allies and major trading partners disagree with our embargo of Cuba and have urged us to change or alter the provisions of the Libertad Act. At the same time, our allies have said they agree with us on the key goal of encouraging democracy and human rights in Cuba.

Last year, the President, for the first time in the 37 years since Castro took power, launched a broad effort to develop a multinational approach to promote democracy in Cuba. The President's initiative built on years of bipartisan policy towards Cuba.

The President launched this initiative when he acted to suspend the right of claimants to file suit under Title III of the Libertad Act. He wanted to use the opportunity presented by the six-month suspension to explore whether US friends and allies were prepared to do more to achieve our common objective of expediting a peaceful transition to democracy in Cuba. I was appointed as Special Envoy for the Promotion of Democracy in Cuba.

After months of effort, thorough consultation with the Congress and the Cuban-American community, and thousands of miles of travel by myself and many dedicated people, we have succeeded in launching an unprecedented, multilateral effort that has changed the terms of the discussion about Cuba. Much more can, should, and will be done, but today we can genuinely say that Cuba's government is increasingly isolated

and under growing pressure to launch fundamental democratic change.

Our initiative has involved governments, non-governmental organizations, and the private sector. As part of our April 11 Understanding with the EU on Helms-Burton, we are seeking to reach an agreement on disciplines on investment in properties expropriated in contravention of international law, and to address questions of conflicting jurisdiction. Agreement on such disciplines would make an important contribution to advancing a key Helms-Burton objective, that is, to deter foreign companies from unfairly acquiring assets that have been confiscated from US nationals by governments, like the Castro regime, which refuse to abide by international norms.

Last week we held another round of talks with European Union representatives. While we still have significant differences with the EU, both sides agreed that we should continue the talks since we are making progress and see promising areas for future work.

EU representatives have said they are disappointed that no agreement was reached at this last round. So are we. Both the EU and the US will benefit from additional protections afforded to our investors.abroad by effective and enforceable disciplines on investments in confiscated properties. And we can both benefit from avoiding problems arising from so-called conflicting jurisdiction, which have been at issue in connection with Helms-Burton and other legislation. That is why we proposed, as part of the agreement, a high-level consultative mechanism to encourage discussion before either side acts.

Closer cooperation with our international partners in responding to threats posed by states that refuse to respect international norms will be more effective in changing unacceptable behavior and will be less likely to result in conflicting policies which undercut our respective interests.

* * *

In conclusion, as the world becomes more interdependent, as we move forward to establishing codes of acceptable international behavior and the will to enforce them, the effective application of sanctions will be a real asset. But it is no panacea. Thus it is all the more important that we undertake a rigorous analysis of sanctions before we impose them. We need to know not only how they will affect the target governments, but also how they affect vulnerable groups within the target countries. We also need to know how proposed sanctions affect US interests in other areas, including US business and workers, and how they affect our international partners on whose cooperation we depend to advance key foreign policy goals.

Sanctions can be an effective tool to punish states that violate international norms and threaten vital US interests. And we must keep this tool at our disposal. But we need to work to sharpen our ability to use it effectively. One lesson is that taking time to forge a consensus both at home with the American people and abroad with our allies can greatly increase the effectiveness of sanctions and reduce the cost to the United States. Building such a consensus in many cases does not come quickly. However, it can help to avoid problems down the road while demonstrating to the offending state that our nation and the international community are united in

opposing its unacceptable behavior.

Sanctions are intended to send a serious message. Both Congress and the Administration need to ensure that, when we do choose to impose them, we do so in a way that has the greatest possible impact with the least possible damage to the US business community, to American workers, and to other US interests.

STUART E. EIZENSTAT
Under Secretary of State for Economic, Business and Agricultural Affairs Department of State

Testimony of
Deputy Assistant Secretary David Marchick
before the California State Assembly
October 28, 1997

It is great to be back in California, my home state. I would like to discuss with you our shared interest in promoting U.S. national security, strengthening protection of human rights and enhancing U.S. competitiveness, export markets and jobs.

Let me begin by saying a few words about exports, jobs and competitiveness.

The world is growing increasingly interdependent. In 1970, U.S. imports and exports were equivalent to 13 percent of gross domestic product (GDP). Now that figure is 30 percent, up from 25 percent in 1992. The U.S. is the largest exporter in the world, exporting over $780 billion worth of goods and services in 1995. Much of this growth in exports is due to the performance of states like California. In the first 6 months of 1997, goods exports from California were running at a rate of $107 billion -- up 45% since 1992--making California America's largest exporting state. If California were a separate nation, it would be one of the largest exporting countries in the world, placing it ahead of Mexico, Switzerland and Brazil. Due in part to our export performance, the U.S. ranked number one in competitiveness for three years in a row and the American economy continues to produce more jobs and more growth than any other major industrialized country. Our prosperity as a nation depends on our ability to compete in international markets. 95 percent of the world's consumers live outside of the U.S., many of them in dynamic, emerging

markets in Latin America and Asia that are growing much faster than our traditional export markets. We can benefit from their growth--but only if their markets are open to our products since our markets are already open to theirs.

Opening markets is critical for creating high wage job opportunities for U.S. workers. Exports support roughly 11 million American jobs. One million of these jobs are generated from agricultural exports like California grapes, beef and almonds. California is America's largest agricultural exporting state, shipping 12% of total U.S. agricultural exports. Today, 1.3 million jobs in California are supported by trade -- an increase of 17% or 187,200 jobs since 1992. These trade related jobs are good ones, paying Californians an average of 15 percent more than non-trade related jobs.

America benefits from free trade that is also fair trade, and this Administration has worked hard to ensure that other countries live up to their word. We have frequently used the World Trade Organization's (WTO) dispute settlement system to enforce our rights. We have filed and won more dispute settlement cases in the WTO than any country in the world. We have benefitted from clearer rules on government procurement which has opened billions of dollars of procurement opportunities for U.S. firms and workers.

Working toward creating a level playing field has benefitted California. For example, the Government procurement Agreement has enhanced access for U.S. companies. California-based companies or companies with facilities in California have won: a $130 million contract to build a satellite for Telenor, Norway's telephone company, and a $30 million contract to bring on line Europe's largest

windmill park in the North of the Netherlands. These companies are also in contention for other projects. For example, Hughes and Lockheed-Martin have bid to sell Telenor an additional satellite worth over $200 million.

Now let me turn to the issue of sanctions. Economic sanctions are an important foreign policy tool intermediate between diplomacy and the use of force. They are used when other measures have been insufficient and when their imposition is likely to change the behavior of the offending state.

Sanctions are not a "one-size-fits-all" foreign policy tool, however. When applying sanctions, if it has the requisite flexibility, the Administration designs a sanctions regime to target the vulnerabilities of the sanctioned country and target effectively the offensive behavior, while minimizing the damage to U.S. interests.

Sanctions are intended to highlight misconduct by rogue regimes, and alter the behavior which threatens our national interests and the stability of the international community. Sanctions address misconduct in the areas of human rights, terrorism, narcotics, weapons of mass destruction, and other areas where such conduct is considered unacceptable by world standards.

To maximize their effectiveness, we prefer sanctions which have multilateral support and participation wherever possible. Multilateral economic sanctions are not only more effective vis-a-vis the target, but they also show unity of international purpose, minimize damage to U.S. competitiveness. and distribute the sanctions burden across responsible countries.

However, we are prepared to use unilateral sanctions when important national interests are at stake. The Clinton Administration has at times employed sanctions to promote human rights or isolate rogue regimes. The president has banned new U.S. investment in Burma to spur the repressive regime in Burma. He signed the Liberated Act to prevent Cuba, the only non-democratic nation in our hemisphere, from profiting from investment in properties confiscated from Americans. He signed the Iran-Libya Sanctions Act to punish Iran and Libya for state-sponsored terrorism. Simultaneously with these actions, the Administration has launched vigorous diplomatic initiatives to encourage other countries to pursue our shared goals.

While we recognize and share state governments' frustration and often outrage at certain countries' unacceptable behavior, we are concerned about the growing number of state and local measures and the message they send to the rest of the world. The President has made it clear that this Administration will challenge the unacceptable behavior of rogue states wherever they are in the world. The Secretary of State has told other countries that the U.S. is prepared to pay the cost of leadership and, if necessary, to go it alone when it comes to delivering a clear message of condemnation to these regimes. Secretary Albright has not pulled any punches -- as diplomats often do -- in expressing the United States outrage at egregious violations of human rights and international norms in countries like Cuba, Burma and Iran.

Our first concern is over whether these sanctions are effective in pursuing the goals we all share. As I said before, to be most effective, sanctions should have multilateral support

and participation wherever possible. While we are the largest economy and most important country, sanctions by the U.S. alone -- or certain states alone -- may not have the desired impact because they can be circumvented. Sanctions often are ineffective unless they are supported by other key countries around the world.

We are also concerned about the impact of sanctions on our domestic economy. While sanctions serve an important foreign policy purpose, they are not without cost. The cost is measured in foregone economic opportunities by countries that put these measures in place. One private sector group estimates foregone opportunities for the U.S. alone in 1996 at $15-19 billion dollars in unrealized exports and the loss of over 200,000 jobs in export-related sectors of our economy.

Second, from the Department of State's perspective, we are concerned that state and local sanctions may impair the President's ability to send a clear and unified message to the rest of the world. As the world's only economic and military super power, the United States has the obligation to project a coherent and consistent message. We would like to work with you to try to send a clear message to oppressive regimes. But ad hoc and scattered actions at various levels of government, however well-intentioned, can do more harm than good in achieving the desired objective and impede the President's and Secretary of State's conduct of foreign policy. They also can create conflicts with our allies with whom we need to work to achieve our common goals.

For example, a variety of state and local officials -- including in California -- recently began considering the imposition of various economic sanctions on Swiss banks and

other Swiss institutions in order to force an accounting for assets of Holocaust victims. Our goal is to provide justice for Holocaust victims, not to punish the Swiss people or their government. The U.S. Government has already issued a very hard-hitting report on the facts in the issue, and the Swiss have taken strong steps to account for the past. But now is the time for cooperation with the Swiss, not confrontation. According to Stuart Eizenstat, Under Secretary of State and the President's point person on this project, state actions at this time are counterproductive, particularly given positive steps the Government of Switzerland is taking to address the issue. Such actions threaten to harden Swiss public opinion against a referendum to create a multibillion dollar humanitarian fund. These sanctions efforts also complicate our government's ability to develop a healing and reconciliation process that helps uncover the truth.

Third, if states do want to express concerns or viewpoints on particular human rights abuses or other objectionable behavior by foreign regimes, we would like to work with them to ensure that these actions complement U.S. foreign policy objectives and are consistent with our international treaties and agreements. As, I mentioned before, as the world's largest exporter, no country does better than the United States when countries follow internationally developed rules. At the same time, the United States must also play by the rules. If state and local sanctions are perceived to violate the rules, they can cause counterproductive disagreement with nations that share the same values and are otherwise inclined to follow our lead in pursuing our foreign policy goals.

Often state and local sanctions can have unintended effects that are counterproductive or divert attention from their original goal. In June 1996, Massachusetts enacted a law applying a price penalty on procurement from companies that have business operations in Burma. The European Union and Japan have initiated dispute settlement consultations in the World Trade Organization over this law, alleging that it violates U.S. obligations under the WTO Government Procurement Agreement.

Our trading partners claim that the Massachusetts law violates provisions of the Government procurement Agreement which, among other things, requires that government contracts be awarded on the basis of objective economic considerations and precludes the application of political criteria.

We are working with the Commonwealth of Massachusetts on this issue, just as we continue to work with the European Union, Japan and others to improve the situation in Burma. Let me be clear. We will defend the rights of the United States in the WTO dispute settlement process. But we must be honest in saying that the threatened WTO case has been an irritant and has diverted the United States' and Europe's attention from focussing where it should be -- on Burma.

Finally, I know that questions have been raised about the constitutionality of state sanctions, and I'm not here to debate that issue, but I can say that state and local sanctions do have the practical effect of interfering with the president's ability to conduct our foreign policy.

My main message today is one of partnership -- an offer to work closely with you to respond to egregious threats to our national security, our interest in enhancing human rights, or our

values. Just as we have reached out to you, we have also consulted with the National Governors' Association, the Association of State Attorneys General, the National Conference of State Legislators, and the National Association of State Procurement Officers.

I hope that we can work together to send the right message to governments that do not respect the basic human rights of their citizens by only taking actions that will be effective and not ones which will strengthen the position of rogue states and divert the U.S. and other countries from our purpose. Our aim is not to try to halt state actions -- rather, we would like to work with you to encourage the judicious and appropriate use of such action. We aid pariah states when the United States does not speak with one voice. We also become embroiled in disputes that could easily be avoided by following a basic American value: living up to our commitments as individuals and as a nation. These avoidable disputes distract us and the nations whose cooperation we need to bring to bear the maximum pressure possible to bring about meaningful change in the lives of the citizens of Burma and elsewhere.

Once again, thank you for the opportunity to speak on these important issues. I look forward to working with you as we move forward.

Drafted:EB/MTA/STA:BPSoila/MJWills
SESTRADE 13314
Cleared:
E : SEizenstat
EB/TPP : DMarchick
USTR:JLang NSC : ESchwartz

CHOATE HALL & STEWART

October 28, 1997
By hand and fax

Harold Fisher, Esq.
General Counsel
Operational Services Division
Executive Office of Administration and Finance
One Ashburton Place, Room 1017
Boston, MA 02108-1552

Re:
Burma (Myanmar) Restricted Purchase List

Dear Mr. Fisher:

The Agfa-Gevaert Group ("Agfa") has informed me that it does not now have a distribution agreement with any entity directing the sale of its products into Burma (Myanmar), and is not otherwise doing business in Burma (Myanmar) as defined in Chapter 130 of the Massachusetts Acts of 1996.

Inasmuch as Bayer AG was named by the Investor Responsibility Resource Center as doing business in Burma because it is the parent of Agfa, and in light of the above information, we request that neither Bayer AG nor Agfa be placed on the Commonwealth's Restricted Purchase List.

In conclusion, based on the information contained

herein and in my letter of October 21, 1997, there is now no basis to include Agfa or Bayer AG, as Agfa's parent, on the Restricted Purchase List. This letter supersedes my letter to the State Purchasing Agent, Mr. Philmore Anderson, dated October 8, 1997. As you know, we have attempted to respond to your office's inquiry as expeditiously as possible. As a consequence, we ask that you accept the representations made herein in lieu of an affidavit from Agfa.

Harold Fisher, Esq.
October 28, 1997
Page 2

Please let us know at your earliest convenience whether you need additional information.

Sincerely,
/s/
Jonathan Chiel

cc: Kenneth E. Steinfield, Esq.

CHOATE, HALL & STEWART

October 21, 1997
By hand and fax
Harold Fisher, Esq.
General Counsel
Operational Services Division
Executive Office for Administration and Finance
One Ashburton Place, Room 1017
Boston, MA 02108-1552

Re: Burma (Myanmar) Restricted Purchase List

Dear Mr. Fisher:

As you requested, this is to update you on the above matter. We are currently working with our client, Agfa-Gevaert, to determine the status and nature of its arrangements with its Malaysian distributor. Agfa-Gevaert is seriously considering, as an option, the termination of that agreement, provided that such termination would satisfy the Secretary of Administration and Finance with respect to the exclusion of the company from the Restricted Purchase List. However, due to the size and structure of the companies involved --the Agfa-Gevaert Group is made up of German and Belgian companies and is headquartered in Germany --and the complexities of the issues raised, it will take time for a decision to be reached. Agfa-Gevaert expects to be in a position to make that decision within 45-60 days.

As we discussed, Agfa-Gevaert is very concerned regarding the ramifications which may potentially arise from its placement on the Restricted Purchase List, including possible damage to its business and reputation. We therefore respectfully request that you provide Agfa with sufficient time to resolve the issue, particularly when such damage may be entirely avoidable and where the Commonwealth may achieve its goals as described above.

While we believe and hope that it may be settled amicably, as I told you, this matter and the potential for damage to Agfa's reputation is so serious that the company may be compelled to consider litigation challenging the statute on various grounds. We believe that a reasonable extension of time, as requested herein, will help in great measure to resolve the matter without the need to resort to litigation.

In short, in light of the above, we believe that deliberate decisionmaking [sic] based on complete information is in everyone's best interest, and that careful consideration by the Secretary and your office is required before any decision is made regarding amendments to the List. We therefore respectfully request that you defer consideration of the placement of our client on the Restricted Purchase List until December 15, 1997 to give the parties sufficient time to work together to bring this matter to an amicable and mutually beneficial resolution.

It is my understanding from our conversations that you are willing to grant us such time given the facts as stated above. I would greatly appreciate written confirmation of such an extension.

Thank you very much for your cooperation and assistance in this matter. Please do not hesitate to contact me at any time to discuss any of the issues raised herein.

Sincerely,
/s/
Jonathan Chiel

cc: Kenneth E. Steinfield, Esq.

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STATE AND MUNICIPAL SANCTIONS REPORT
DECEMBER 1, 1997

PENDING

State/MuniC..	Target Country	Description	Status
Chicago, IL	Switzerland	*Ordinance 97-314.* Selective investment measure. Prohibits the city from depositing or investing public funds in financial institutions doing business in Switzerland.	After a 5/9 hearing the Finance Committee, noting positive action by Switzerland and Swiss financial institutions, delayed further action until Fall.

Davis, CA	Burma	*Resolution.* Selective Purchasing measure. Prevents the city from purchasing goods or services from companies doing business in Burma.	The measure was introduced by the City's Human Relations Commission. After a 9/24 Council meeting, the measure was returned to the Commission for an analysis of its impact on the city's procurement. Further consideration by the Council is not likely in the near term.

State/Muni.	Target Country	Description	Status
Los Angeles, CA	Burma	*Motion Ref. No. 97-18-61.* Sponsored by Councilman Alarcone. Directs the Chief Legislative Analyst (CLA) to prepare a report on other municipalities restricting purchases with companies doing business in Burma and to provide a draft ordinance within 45 days.	The motion was introduced and referred to the Budget and Finance & Intergovernmental Relations Committees on 10/7. The CLA continues gathering information for the report and, possibly, a draft ordinance to be considered later this year.
Mass.	Indonesia	*House Bill 4575.* Selective purchasing and investment measure. Prohibits the state from contracting with companies and financial institutions doing business in Indonesia.	Reported out of the Joint State Administration Committee on 5/28 and referred to the House Ways and Means Committee on 6/12.

New Jersey	Switzerland	*Assembly Bill 32351.* Selective investment measure. Requires the state to divest pension funds from Swiss banks and financial institutions.	A.B. 3251 was introduced and referred to the Financial Institutions Committee on 11/6. Sponsored by Assemblyman Weingarten and O'Toole.

State/Munic.	Target Country	Description	Status
		Assembly Bill 2901 & Senate Bill 2034. Prohibit the state from employing Swiss financial institutions, not complying with certain agreements, in connection with the sale of its temporary disability benefits plan.	A.B. 2901 was introduced and referred to Appropriations Committee on 5/5. S.B. 2034 was introduced and referred tot he State Management Committee on 5/8.
		Assembly Bill 2822 & Senate Bill 1966. Selective purchasing and investment measures.	A.B. 2822 and S.B. 1966 remain in their respective State Governmetn Committees.

New York	Multiple	*Assembly Bill 5753 & Senate Bill 3513.* Provides for the revocation of state banking licenses for foreign financial institutions determined to be in illegal possession of funds belonging to holocaust victims.	A.B. 5753 was introduced and referred to the Banks Committee on 3/4. S.B. 3513 was introduced and referred to the Banks Committee on 3/12.
New York	Switzerland	*Senate Bills 4185 & 4763* . Selective purchasing and investment measures. Prohibit the state from purchasing goods or services or investing public funds in companies doing business in Switzerland.	S.B. 4185 remains in the Civil Service and Pensions Committee. S.B. 4763 remains in the Corporations, Authorities and Commissions Committee.

The information contained in this report was compiled by the Organization for International Investment (OFII). Please contact Alexander Williams at (202) 659-1903 if you have any additions or changes to the report, are aware of state and municipal measures not listed here or know of a change in a measure's status. Entries in BOLD have been added or changed from the previous report.

State/Munic.	Target Country	Description	Status
New York, NY	Switzerland	*Intro 905.* Selective investment measure. Prohibits city from depositing or investing public funds in Swiss financial institutions.	Since introduction and consideration in early February the bill has not progressed.
Pennsylvania	Multiple	*House Bill 1855.* Provides for the revocation of state banking licenses for foreign financial institutions not cooperating in the distribution of dormant accounts of victims of Nazi persecution.	H.B. 1855 was introduced and referred to the Commerce and Economic Development Committee on 10/1.
	Switzerland	*House Bill 1854.* Prohibits the state from investing public funds in any bank or financial institution, including affiliates, chartered in Switzerland and failing to comply with certain reparation agreements.	H.B. 1854 was introduced and referred to the Finance Committee on 10/1.

State/Munic.	Target Country	Description	Status
Rhode Island	Indonesia	*House Bill 6721* and *Senate Bill 984*. Selective investment measures. Prohibit the state from investing in companies and financial institutions doing business in Indonesia. S.B. 984 also prohibits purchasing Indonesian goods.	H.B. 6721 remains in the House Finance Committee. S.B. 984 remains in the Senate Corporations Committee. The Legislature is currently recessed and will reconvene sometime in January.

Seattle, WA	Burma	Selective purchasing measure. Penalizes companies with direct investments and/or employees in Burma in the city's bidding process for contracts with a value of $100,000 or more. Bidders with no business ties in Burma will be preferred to those which do have business ties in Burma, when the process results in two equally low bids.	The Business, Economic and Community Development Committee discussed the proposed sanction on multiple occasions, but delayed voting each time. The measure is now in its third revision. The committee will host a panel discussion with 3 speakers for and 3 opposed to the sanction in the near future. Consideration by the full council is possible following this event.

INACTIVE

State/ Municipality	Target Country	Description	Status
California	Burma	*Assembly Bill 888.* Selective purchasing and investment measure. Requires individuals and companies contracting with the state to certify, under penalty of perjury, that they have no business ties with Burma.	After the International Trade Committee's April hearings, the bill was sent to an Interim Study Subcommittee. Effectively killing it for this year. On 10/28, the Committee, held a broadly defined hearing on the issue of sanctions.
Connecticut	Burma	*House Bill 6354.* Selective purchasing measure. Prevents the state from purchasing goods or services from companies doing business in Burma.	On 3/27 the bill was put on the House calendar, where it remained. On 6/4 the Legislature adjourned, killing the bill.

New York, NY	China, Cuba, Egypt, Indonesia, Iran, Iraq, Laos, Morocco, Nigeria, North Korea, Pakistan, Saudi Arabia, Sudan, Turkey, Vietnam.	*Intro 960.* Selective purchasing, selective investment and divestiture measure. Prohibits the city from purchasing goods and services from or entering into a contract with, or depositing and investing funds in companies doing business with the fifteen listed countries. Requires already invested city funds to be removed.	Introduced on 5/14, by Council Chairman Peter Vallone, the bill was referred to the Government Operations Committee. Through the advocacy efforts of USA *Engage and the New York City Partnership, Vallone was persuaded to accept optional business principles as an alternative to the bill. The agreement was announced on 10/9 and has been confirmed by committee staffers.

North Carolina	Burma	*Senate Bill 1054.* Selective purchasing measure. Authorizes and encourages counties, cities and local boards of education to establish purchasing requirements concerning companies with ties to Burma and the use of public funds.	After passing the Senate, the bill was referred to the House Commerce Committee on 5/8. Committee chairman David Miner opposed the measure. The bill is dead as the Legislature adjourned for the year on 8/28.
Texas	Burma	*House Bill 2960.* Selective purchasing and investment measure.	Following an 4/23 hearing, the State Affairs Committee decided not to vote on the bill. The Legislature has adjourned for the year and the measure is dead.

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LAW

State/ Municipality	Target Country	Description	Status
Alameda County,CA	Burma	Selective Purchasing and Investment.	Enacted December 1996.
Alameda County, CA	Nigeria	Selective Purchasing and Investment.	Enacted October 1997.
Amherst, MA	Nigeria	Selective Purchasing and Investment.	Enacted September 1997.
Ann Arbor, MI	Burma	Selective Purchasing.	Enacted April 1996.
Berkeley, CA	Burma	Selective Purchasing.	Enacted March 1995
Berkeley, CA	Nigeria	Selective Purchasing.	Enacted July 1997
Berkeley, CA	Tibet	Selective Purchasing.	Enacted June 1997
Boulder, CO	Burma	Selective Purchasing.	Enacted December 1996
Brookline, MA	Burma	Selective Purchasing.	Enacted November 1997
Cambridge, MA	Nigeria	Selective Purchasing.	Enacted May 1997
Carrboro, NC	Burma	Selective Purchasing.	Enacted October 1996
Chapel Hill, NC	Burma	Selective Purchasing.	Enacted January 1997
Dade County, FL	Cuba	Selective Purchasing and Investment.	Enacted July 1992. Updated June 1993*
Madison,WI	Burma	Selective Purchasing.	Enacted August 1996
Massachusetts	Burma	Selective Purchasing.	Enacted June 1996
New York, NY	Burma	Selective Purchasing and Investment.	Enacted May 1997
Newton, MA	Burma	Selective Purchasing.	Enacted November 1997.

State Municipality	Target Country	Description	Status
Oakland, CA	Nigeria	Selective Purchasing Investment.	Enacted May 1997.
Oakland, CA	Burma	Selective Purchasing and Investment.	Enacted May 1996.
Palo Alto, CA	Burma	Selective Purchasing.	Enacted October 1997.
Quincy, MA	Burma	Selective Purchasing.	Enacted November 1997.
San Francisco, CA	Burma	Selective Purchasing.	Enacted April 1995.
Santa Cruz, CA	Burma	Selective Purchasing and Investment.	Enacted July 1997.
Santa Monica, CA	Burma	Selective Purchasing.	Enacted November 1995.
Takoma Park, MD	Burma	Selective Purchasing.	Enacted October 1996.
West Hollywood, CA	Burma	Selective Purchasing.	Enacted October 1997.

*Broadened to include companies violating the Cuban Liberty and Democracy Act.

NEWMONT MINING CORPORATION

December 2, 1997
Mr. Philmore Anderson
State Purchasing Agent
Executive Office for Administration and Finance
Operational Services Division
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108-1552

Re: Restricted Purchase List; Ch. 130 of the Massachusetts Acts of 1996

Dear Mr. Anderson:

By letter dated January 31, 1997, your office notified Newmont Mining Corporation that Newmont had been placed on the restricted purchase list pursuant to Chapter 130 of the Massachusetts Acts of 1996, "An Act Regulating State Contracts with Companies Doing Business with or in Burma ("Myanmar").

Please be advised that, effective July 12, 1997, Newmont Mining Corporation's affiliate, Newmont Mineral Exploration B.V., terminated its existing agreements with the No. 2 Mining Enterprise, a Burmese state economic enterprise. Aside from winding up the affairs of Newmont Mineral Exploration B.V., neither Newmont Mining Corporation nor

any of its affiliates is currently conducting operations in or doing business with Burma. Accordingly, please remove Newmont Mining Corporation from your restricted purchase list. An affidavit regarding this matter is enclosed.

If you have any questions, please give me a call at (303) 837-5998.

Very truly yours,
/s/
Britt D. Banks

cc: Lawrence Kurlander

AFFIDAVIT

STATE OF COLORADO
CITY AND COUNTY OF DENVER

I, Britt D. Banks, state and affirm as follows:

1. I am the Associate General Counsel of Newmont Gold Company, a subsidiary of Newmont Mining Company, and in such capacity have knowledge of the matters contained herein.

2. On July 12, 1996, Newmont Mining Corporation's affiliate, Newmont Mineral Exploration, B.V., entered into two "Agreements for Mineral Prospecting, Exploration, Development and Production of Gold" with the No. 2 Mining Enterprise, and economic enterprise wholly owned by the government of the Union of Myanmar.

3. Effective July 12, 1997, Newmont Mineral Exploration, B.V. terminated both of its Agreements with the No. 2 Mining Enterprise.

4. Aside from winding up the affairs of Newmont Mineral Exploration B.V., neither Newmont Mining Corporation nor any of its affiliates is currently conducting any activities which constitute "doing business with Burma (Myanmar)" within the meaning of Chapter 130 of the Massachusetts Acts of 1996.

/s/ Britt D. Banks /jurat omitted/

Testimony of
Deputy Assistant Secretary David Marchick
before the Maryland House of Delegates
Committee on Commerce and Government Matters
March 25, 1998

Thank you for the opportunity to speak with you today. I would like to discuss with you OUT shared interest in promoting U.S. national security, strengthening protection of human rights and enhancing U.S. competitiveness.

Let me begin by placing state sanctions in the context of exports, jobs and competitiveness.

The world is growing increasingly interdependent. In 1970, U.S. imports and exports were equivalent to 13 percent of gross domestic product (GDP). Now that figure is 30 percent. The United States once again has become the world's number one exporter, the world's largest manufacturer of automobiles, the world's premier agricultural exporter, and the world's leading producer of semiconductors. From coast to coast business is growing, real wages are rising and inflation is under control. Truly, the American economy has become the envy of countries around the globe.

While this stunning success is attributable to many factors, American participation in an increasingly rule-based global trading system is among the most important. International trade is a vital component of our economic strength at home and abroad. Since 1993, more than a third of our economic growth has come directly from exports. Much of this growth in exports is due to the performance of states like

Maryland.

The Port of Baltimore is the gateway to the global market place for exports and imports to and from Maryland and the entire country. From 1987 through 1996, Maryland goods exports increased 129.1% to $3.5 billion. In the first 6 months of 1997, Maryland's goods exports were running at a rate of $4.1 billion -- up 37% since 1992. Maryland's interests international trade translates into almost 50,000 jobs -- high paying jobs that pay 15% higher wages than other jobs in Maryland

Our prosperity as a nation depends on our ability to compete in international markets. Ninety-six percent of the world's consumers live outside of the U.S., many of them in dynamic, emerging markets in Latin America and Asia that are growing much faster than our traditional export markets. We can benefit from their growth-but only if their markets are open to our products, since our markets are already open to theirs.

America benefits from free trade that is also fair trade, and this Administration has worked hard to ensure that other countries live up to their word. We have frequently used the World Trade Organization's (WTO) dispute settlement system to enforce our rights. We have filed and won more dispute settlement cases in the WTO than any country in the world for a wide spectrum of U.S. industries from agriculture, to manufacturing, services industries and intellectual property. We have benefitted from clearer rules on government procurement which has opened billions of dollars of procurement opportunities for U.S. firms and workers. Working toward creating a level playing field has benefitted Maryland. For example, the WTO's Government Procurement

Agreement has enhanced access for Maryland companies in key markets such as Japan and Europe.

Now let me turn to the issue of sanctions. Economic sanctions are an important foreign policy tool that provides an option between diplomacy and the use of force. They are used when other measures have been insufficient and when their imposition is likely to change the behavior of the offending state.

Sanctions are not a "one-size-fits-all" foreign policy tool, however. When the U.S. must apply sanctions, the Administration seeks to design a sanctions regime to target the specific vulnerabilities of the sanctioned country so as to ensure the best and fastest possible response to our concerts, while minimizing the damage to other important U.S. interests. Sanctions are intended to highlight misconduct by regimes, and alter the behavior which threatens our national interests. Sanctions can address misconduct in the areas of human rights, terrorism, narcotics, weapons of mass destruction, and other areas where such conduct is considered unacceptable by world standards.

To maximize their effectiveness, we prefer sanctions that have multilateral support and participation. Multilateral economic sanctions are not only more effective vis-a-vis the target, but they also show unity of international purpose, minimize damage to U.S. competitiveness, and distribute the sanctions burden across responsible countries.

However, we are prepared to use unilateral sanctions when important national interests are at stake. The Clinton Administration has at times employed sanctions to promote human rights, isolate rogue regimes and advance our economic

interests in the global economy. In response to extreme actions taken by the Nigerian government, the President has imposed a visa ban on Nigerian senior officials and has banned military sales and services to Nigeria. He has banned new U.S. investment in Burma to prevent the repressive regime in Burma from benefitting from its misdeeds. He signed the Iran-Libya Sanctions Act to send a strong message to Iran and Libya to halt state sponsored terrorism and the acquisition of weapons of mass destruction. Simultaneously with these actions, the Administration has launched vigorous diplomatic initiatives to encourage other countries to pursue our shared goals of changing the behavior of pariah regimes, improving the conditions under which their citizens live and working towards a world free from the threat of terrorism and weapons of mass destruction.

While we recognize and share state governments' frustration and often outrage at certain countries' unacceptable behavior, we are concerned about the growing number of state and local measures and the message they send to the rest of the world. The President has made it clear that this Administration will challenge the unacceptable behavior of rogue states wherever they are in the world. The Secretary of State has told other countries that the U.S. is prepared to pay the cost of leadership and, if necessary, to go it alone when it comes to delivering a clear message of condemnation to these regimes. Secretary Albright has not pulled any punches -- as diplomats often do -- in expressing the United States' outrage at egregious violations of human rights and international norms in countries like Cuba, Nigeria, Afghanistan, Burma and Iran. But state sanctions often can confuse the message the United States

sends and impede our ability to build coalitions to focus on the targeted regime. Let me outline a few concerns we have about state sanctions.

Our first concern is whether sanctions are effective in pursuing the goals we all share. As I said before, to be most effective, sanctions should have multilateral support and participation wherever possible. While the U.S. is the largest economy and most important country, sanctions by the U.S. alone may not have the desired impact because they can be sometimes and often are circumvented. Sanctions often are ineffective unless they are supported by other key countries.

Second, from the Department of State's perspective, we are concerned that state and local sanctions may impair the President's ability to send a clear and unified message to the rest of the world. As the nation to which the world looks for leadership, the United States has the obligation to project a coherent and consistent message. We would like to work with you to send a clear message to oppressive regimes. But ad hoc and scattered actions at various levels of government, however well-intentioned, can do more harm than good in achieving the desired objective. They can impede the President's and Secretary of State's conduct of foreign policy. They also can create conflicts with our allies with whom we need to work to achieve our common goals.

For example, a variety of state and local officials recently began considering the imposition of various economic sanctions on Swiss banks and other Swiss institutions in order to force an accounting for assets of Holocaust victims. Our goal is to provide justice for Holocaust victims, not to punish the Swiss people or their government. The U.S. Government

has already issued a very hard-hitting report and the Swiss have taken strong steps to account for the past. But now is the time for cooperation with the Swiss, not confrontation. According to Stuart Eizenstat, Under Secretary of State and the President's point person on this project, state actions at this time are unwarranted and counterproductive, particularly given positive steps the Government of Switzerland is taking to address the issue. Such actions threaten to harden Swiss public opinion against staying this positive course. These sanctions efforts also complicate our government's ability to develop a healing and reconciliation process that helps uncover the truth.

Third, if states do *want* to express concerns or viewpoints on particular human rights abuses or other objectionable behavior by foreign regimes, we would like to work with them to ensure that these actions complement U.S. foreign policy objectives and are consistent with our international treaties and agreements. As I mentioned before, as the world's largest exporter, no country does better than the United States when countries follow internationally developed trade rules. At the same time, the United States must also play by the rules. If state and local sanctions are perceived to violate the rules, they can cause counterproductive disagreements with nations that share the same values and are otherwise inclined to follow our lead in pursuing our foreign policy goals.

Fourth, we are also concerned about the impact of sanctions on our domestic economy. While sanctions serve an important foreign policy purpose, they are not without cost. The cost is measured in foregone economic opportunities by countries that put these measures in place. One private sector

group estimates foregone opportunities for the U.S. alone in 1996 at $15-$19 billion dollars in unrealized exports and the loss of over 200,000 jobs in export-related sectors of our economy.

Often state and local sanctions have unintended effects that are counterproductive or divert attention from their original goal. In June 1996, Massachusetts enacted a law applying a price penalty, for purposes of bidding on procurement opportunities, on companies that have business operations in Burma. The European Union and Japan have initiated dispute settlement consultations in the World Trade Organization over this law. Our trading partners allege that the Massachusetts law violates certain provisions of the Government Procurement Agreement.

We are working closely with the Commonwealth of Massachusetts on this issue, just as we continue to work with the European Union, Japan and others to improve the situation in Burma. We have made a lot of progress. Let me be clear. We will defend the rights of the United States in the WTO dispute settlement process. But we must be honest in saying that the threatened WTO case has been an irritant and has diverted the United States' and Europe's attention from focussing where it should be -- on Burma.

We share Maryland's concerns about human rights in Nigeria and the necessary democratic reforms which must take place to improve the lives of Nigerian citizens. In its 1997 human rights report, the Administration issued a stinging account of the Nigerian Government's human rights abuses. The report holds, "The [Nigerian] Government's human rights

record remained dismal. Throughout the year, [Sani] Abacha' s Government relied regularly on arbitrary detention and harassment to silence its most outspoken critics." The report goes on to note, "Security forces continued to commit extrajudicial killings arid use excessive force to quell antigovernment protests...". The report concludes that citizens of Nigeria do not have the right to change their government by peaceful means and that despite the announced timetable for transition from military to multiparty rule, there was little meaningful progress toward democracy. This scathing report demonstrates that we are in agreement with Maryland about the deplorable human rights and democratic situation in Nigeria and we welcome the voice of the people of Maryland demanding change.

We do have concerns, however, about the way Maryland has chosen to respond to the Nigerian situation Specifically, certain provisions in the bill will make it difficult for us to continue our efforts to work with our trading partners to implement effective multilateral measures to influence reform in Nigeria. These provisions raise serious questions, much like the Massachusetts Burma law, and we would like to work with you to ensure that we don't expose ourselves~ to a potential WTO challenge.

Finally, I know that questions have been raised about the constitutionality of state sanctions. I'm not here to debate those legal issues, but I can say that state and local sanctions that are inconsistent with our obligations to our political allies and trading partners can have the practical effect of interfering with the President's ability to conduct our foreign policy. Too often we find ourselves answering criticism about certain state

and local actions rather than focussing on the poor behavior of the object of those actions.

My main message today is one of partnership -- an offer to work closely with you to respond to egregious threats to our national security, our interest in enhancing human rights, or in promoting other of our national values. We have had constructive private conversations with a number of Maryland legislators on this issue. We have made it clear to them and we want to make it clear to you that we fully support Maryland's desire to be heard, not silenced. Just as we have reached out to you, we have also consulted with the National Governors' Association, the Association of State Attorneys General, the National Conference of State Legislators, and the National Association of State Procurement Officers.

I hope we call work together to send the right message to governments that do not respect the basic human rights of their citizens. Our aim is not to try to halt state actions -- rather, we would like to work with you to encourage the judicious and appropriate use of sanctions. We can inadvertently aid pariah states when the United States does not speak with one voice. Measures by states that transgress our international obligations embroil us in disputes that could easily be avoided. Discord with our allies weakens opposition to rogue regimes and trade disputes can impair the cooperation that is essential bringing about meaningful change in the lives of the citizens of Nigeria and elsewhere.

Once again, thank you for the opportunity to speak on these important issues. I look forward to working with you as

we move forward.

Restricted Burma Purchase List

U.S. Companies

Abercrombie and Kent (A&K) Int'I Inc.
Angelina Hardwood Sales
American Vision Professional
*Arvin Industries Inc. (s)
*Atlantic Richfield Co. (s)
Carlson Holdings Inc.
*Caterpillar (s)
China Resource Development Inc.
Consolidated Stores Corp.
Dean Hardwoods Inc.
DHL Airways
East Asia Gold Corp.
*Emerson Electric Co.
*Federal Express Corp. (s)
First General Serices
*Halliburton Co. (s)
*HFS Inc. (s)
Indo-China Express Inc.
Inland Water Transport
*Interdigital Communications Corp.
*Interpublic Group of Cos. (s)
JCB (International) Credit Card
Johnson & Johnson Inc.
King Koil Licensing Co. Inc.
KMD Computer Ltd.
*McDermott International (s)
Northwest Airlines
Ocean Cruise Line Inc.
Pacific Architects & Engineers
Pan American Enterprises

Procter & Gamble Co. (s)
Servcorp
Showcase Entertainment Inc.
Silver Sea Cruise
*Smith International Inc. (s)
Teak Imports International
*Texaco (s)
*Textron Inc. (s)
*Unocal Corp. (s)
United Parcel Service
United Technologies Corp.
*York Holdings Corp.
Zin International
Zippo Manufacturing Co.

Non-U.S. Companies

A & S International Co. Ltd.
A.P.G.Technologies Pte. Ltd.
ABB Asea Brown Boveri Ltd.
ABN Amro Bank Ltd.
Acer Inc.
Adman Club Co. Ltd.
AEA International
Aeolus (Dong Feng) Trucks & Buses
Ajinomoto Co., Inc.
Alcatel Alsthom SA
All Nippon Airways Co. Ltd.
Allied Container Servces
Altius Houtagenturen B.V.
Amara International Singapore
Amer Group Ltd.
Andre Hesse & Co. GmbH
Antares Trading GmbH

Arnold Otto Meyer
Asia Associates Bangkok Ltd.
Atlantic Laboratories Corp. Ltd.
Atlantic Outline Myanmar Co. Ltd.
B.A.T. Industries PLC
Bagan Hotel Co. Ltd.
Baiyoke Group
Baiyoke Kandawgyi Hotel Co.
Ban Hock Hin Engineering Co. Pte. Ltd.
Bangkok Bank of Commerce
Bangkok Container Lines
Bank of Ayudhya
Bank of Commerce Malaysia
Bank of Tokyo-Mitsubishi Ltd.
Banque Francaise Du Commerce Exterieur
Banque Indosuez
Banque Nationale de Paris
BCE Inc.
Bell Metal Industries
Berjaya Industrial Bhd.
Berliner Bank
Beta Funds
Bionorica GmbH
BMW (Bayerische Motoreweke)
BOC Group PLC
Bollinger Furriere
Boustead Shipping Agencies Sdn. Bhd.
Bousteadco Singapore Ltd.
Bridgestone Corp.
British Airways
British Petroleum Co. PLC
Broken Hill Proprietary Co. Ltd.
Burmah Castrol PLC
C&P Holdings Pte. Ltd.
C. Melchers Gmbh & Co.

CBM Corp.
Central Floating Hotel Ltd.
Chemical Co. of Malaysia Bhd. (CCM)
Chiyoda Corp.
CibaGeigy Ltd.
Comfort Group
Consolidated Spectra Ventures Ltd.
Constance Carroll Holding Ltd.
Costa Crociere S.p.A.
Credit Agricole (Caisse Nationale du)
Credit Commercial de France
Croisieres Paquet
Cycle and Carriage Ltd.
Daewoo Corp.
Dai-Ichi Kangyo Bank
Daiwa Institute of Research
Daiwa Securities Co. Ltd.
Daihoff Larsen & Hornemann (DLH)
Damarc Srl
Det Ostasiatiske Kompagui A/S
Deutsche Bank
Deutsche Lufthansa AG
Deutsche Telekom
Development Bank of Singapore Ltd.
DHL International Ltd.
Diethelm Holding AG
Diplomatic Business Pte. Ltd.
Discoverey Helicopters
Diversified Mineral Resources Ltd.
Dong Feng Motor Industry Corp.
Dopharma International B.V.
DP Intertrade
Dresdner Bank AG
E.Merck Beteilgungen oHG

Eagle (Myanmar) Co. Ltd.
Eagle Company Ltd.
Earth Industrial PLC
East Asiatic Co. SA
Eastern & Oriental Express
Emerald Rose Garden Co. Ltd.
Empire Oil Co. (Pacific) Ltd.
EPG Travel Co. Ltd.
Europ Continents
Evian
Exe Design Co. Ltd.
Exe Sakura Co. Ltd.
Export Import Bank of Korea
Export Import Bank of Thailand
FA. Voigt & Co. B.V.
Fidelio Software Co. Ltd.
First Automotive Works (FAW)
First Dynasty Mines Ltd.
Fraser & Neave Ltd.
Fritz Anders GmbH & Co.
Fuji Bank Ltd.
Fuji Photo Film Co. Ltd.
Fujita Corp.
Fulbrim (S) Pte. Ltd.
Gainwell Medimart
Gemco International B.V.
Globe Industries GmbH
Golden Shell Co. Ltd.
Grand Metropolitan PLC
Guinness PLC
Hakuhodo Inc.
Haaako
Hazama Corp.
Health Corp. of Singapore (HCS)

Heinrich Feldmeyer GmbH & Co. K.G.
Honda Motor Co.
Hotel Propenties Ltd.
HSBC Holdings PLC
Hunting PLC
Hyundai Corp.
Idris Hydraulic Bhd.
IHC Caland NV
Infornatics Holding Ltd.
Indian Airlines Ltd.
Indochina Goldfields Ltd.
ING Bank International
Interdent Holding AG
International Panoraina Resources Corp.
Itochu Corp.
Invest-Import Yugoslavia
Isuzu Motors Ltd.
Italian-Thai Development
Itochu Corp.
Ivanhoe Capital Corp.
Jade Enterprise
Japan Air Lines
Japan Trade Service Inc.
JCB International (Canada) Ltd.
Johannes Schuback & Sohne GmbH
JVC Victor Co. of Japan Ltd.
Kailis (M.C.) Holdings PLC
Kajima Corp.
Karl Danzer Furnierwerke GmbH
Kelang Port Management
Kemayan Corp. Bhd.
Keppel Bank
Keppel Corp. Ltd.
KLM Roval Dutch Airlines
Konica Co.

Koor Industries
Korea Exchange Bank
Krung Thai Bank Co. Ltd.
Kunming Heavy Machinery Plant
Kunming Int'l Economic and Tech.
Kuok Singapore Ltd.
Kuoni AG
Laboratories Biocodex
Lion Nathan International o. Ltd.
Loxley Public Co. Ltd.
L.P. Holding Co. Ltd.
Landmarks Bhd.
Lao Aviation Co.
Leeward Capital
Longreach Gold Oil Ltd.
M.O. Air Sytem Inc. (M.O. Tourist)
Mackie International Group PLC
Malayan Banking Berhad
Malaysia Airline System Bhd. (MAS)
Mamee-Double Decker (M) Blid.
MAN AG
Mario Bernucci SpA
Marubeni Corp.
MASA Telecom Inc.
Matsushita Electric Industrial Co. Ltd.
Mazda Motor Corp.
Meiwa Marine and Industrial Pte. Ltd.
Merchantile Interaational Petroleum Inc.
Michelin, Cie. Generale des Establissements
Milesluck Co. Ltd.
Mindoro Resources Ltd. (MDRO/CDN)
Mita Industrial Co. Ltd.
Mitsubishi Construction
Mitsubishi Corp.
Mitsubishi Electric

Mitsubishi Heavy Industries
Mitsubishi Materials
Mitsubishi Motors Corp.
Mitsui & Co. Ltd.
Mitsui Construction Co. Ltd.
Myanmar Hotels International Ltd.
Myanmar Macau International
Myanmar MCG Corp.
Myanmar Swan Investment Ltd.
National Machinery Import & Export Corp.
Nestle S.A.
Newscom Pte. Ltd.
Nichimen Corp.
Nikken Rentacom Co. Ltd.
Nikko Shoji Co.
Nippon Investment & Finance Co. Ltd.
Nippon Kokan Kaisha (NKK Corp.)
Nippon Oil
Nissan Motor Co.
Nissho Iwai Corp.
Nutricia
Nutricta NV
Northern Telecom Ltd.
Nouveau Marketing Co. Ltd.
Nova Corp.
NTN Corp.
Okura & Co. Ltd.
Oversea-Chinese Banking Corp. Ltd.
Overseas Union Bank
Pacific Arc Exploration
Pacrim Energy NL
Pakistan International Airlines
Peter Cremer GmbH & Co.
Petroleum National Behard (Petronas)
Platinum Private Ltd.

Pohang Iron and Steel
Pokka Corp.
Premier Oil PLC
Prime Utilities Bhd.
PSA Peugeot Citroen SA
PT Asia Cellular Satellite Systems (ACeS)
PT Astra International
PT Cumawis
PTT Exploration & Production PLC
Puukeskus Oy
Richemont, Co. Financiere
Rolls-Royce PLC
Royal Bruei Airlines
Royal Dutch Petroleum Co.
Royal Lake Hotel Co. Ltd.
*Schlumberger Ltd. (s)
SCT (Siam Cement Trading)
Samsung Corp.
Sanwa Bank
Sanwa Trading Co. Ltd.
Sea Containers Ltd.
Segye Corp.
Seiko Corp.
SKF AB
Shangri-La Hotels Ltd.
Sharp Corp.
Shell Transport & Trading Co. Plc.
Siam Citv Bank Ltd.
Siam Syntech Construction Co.
Siemens AG
Singapore Airlines Ltd.
Singapore Teclinologies Industrial Corp. Ltd.
Sony Corp.
Ssangyong Group
Standard Chartered Bank

Stevens Paper & Board B.V.
Straits Steamship Land Ltd.
Sum Cheong International Ltd.
Sumitomo Corp.
Sy Cip Gorres Veuyo and Co.
System-Built Myanmar Ltd.
Taiga Consultants Ltd.
Taisei Corp.
Tamasu Co. Ltd.
Telefonaktiebolaget LM Ericsson
Telrad Telecom. & Electronic Industries
Temasek Holdings Ltd.
Thai Airways International PLC
Thai Farmers Bank Ltd.
Thai Military Bank Ltd.
Til Ltd.
Toshiba Corp.
Total S.A.
Toyota Motor Corp.
Traders Yangon Co. Ltd.
Trafalger House PLC
Trevi SpA
UCB S.A.
Union Chimique Belge (UCB) S.A.
United Communications Industry Public Co.
United Engineers Ltd.
United Info Summit (UIS)
UPSA Laboratories
VEBA AG
Venice Simplon Orient Express
Victor Co. of Japan
Victoria Garment Manufacturing Co. Ltd.
Victoria Group
Wheelock Group
Wing Tai Holdings Ltd.

Wo Kee Hong Holdings Ltd.
Worldcare Travel Insurance
Wong Yin Chong Pte. Ltd.
Yangon Wood Industries Ltd.
YTL Corp. Bhd
Yunnan Machinery Import & Export Corp.
YWIL

*Parent Companies with Subsidiaries

Subsidiaries of U.S. Companies

Subsidiaries of Arvin Industries Inc.

AVM, Inc.
Arvin International Holdings
Gabriel Europe, Inc.
Gabriel Ride Control Products Inc.
Gabriel S.A.
Maremont Corp.
Maremont Exhaust Products Inc.
Q International Inc.
Roll Coater Inc.
Space Industries Int'l Inc.

Subsidiaries of Atlantic Richfield Co.

Arco Alaska Inc.
Arco Chemical Co.
Arco Transportation Alaska Inc.
Vastar Resources Inc.

Subsidiaries of Caterpillar

A/O Nevamash
Advanced Fuels L.L.C.
Advanced Technology Services Inc.
Anchor Coupling Inc.
Balderson Inc.
CM Human Services Co., Ltd.
CMEC Co. Ltd.
Carter Machinery Co. Inc.
Caterpillar Industrial Inc.
Caterpillar Industrial Products Inc.
Caterpillar Mexico S.A. de C.V.
Caterpillar Overseas S.A.
Caterpillar of Delaware Inc.
Compsolven Corp.
Energy Services International Group Ltd.
Energy Services International Ltd.
Engine Services Specialilst Inc.
Immobililiaria Conek S.A.
Mec-Track S.r.L.
Nexus Internatinal Inc.
OTSG Inc.
P.T. Natra Raya
Roady Ready Inc.
SCM Operator Training Co. Ltd.
SCM System Service Co. Ltd.
Sagami GS Co. Ltd.
Servtech Ltd.
Solar Turbines Canada Ltd.
Solar Turbines Inc.
Solar Turbines International Co.
Solar Turbines S.A.
Technologia Modificada S.A. de C.V.
Turbinas Solar S.A. de C.V.
Turbinas Solar de Venezula, C.A.
Turbo Technologia de Reparaciones S.A. de C.V.

Subsidiaries of Emerson Electric Co.

Andre Cocard S.A. R.L.
Angar Scientific Co. Inc.
Appleton Electric Co.
Appleton Electric Ltd.
Applied Concept Inc.
Asco Investment Corp.
Ascoletric Ltd.
Asomatica S.A. de C.V.
Ascomation (NZ) Ltd.
Ascomation Pty. Ltd.
Ascoval Industria E Commercio Ltd.
Atelier de Bobinage de Meteurs Elec.
Belzon & Richardot S.A.R.L.
Betrand-Polico S.A.
Branson Ultrasoncis Corp.
Branson Ultrasonics S.A.
Brooks Instrument B.V.
Brooks Instrument K.K.
Buehler Ltd.
C.E. Set S.R.L.
CDP International Inc.
Carbide Blast Joints Inc.
Chromalox GmbH
Clairson Inc.
Clairson International Corp.
Clairson de Mexico
Commercial Cam Co. Inc.
Compania de Motores Domestics
Componentes Avanzados
Compresreur Mechaniques
Construction Electriques du Nord
Constructions Electriques de Beau

Control Concepts Corp.
Control Techniques East Asia .
Control de Temperatura S.A. de C.V.
Controles Electromecanicos De Mex
Copeland Corp.
Copeland Electric Corp.
Credo Tool Co.
Crouzet Appliance Controls S.A.
Crouzet Applliance Controls SpA
D'Orleans S.A.R.L.
DML Industrial Products Inc.
Digital Appliance Controls
E.G.P. Corp.
EECO Inc.
EMR Holdings Inc.
Electronique du Sud-Quest S.A.
Emerson Capital Funding Inc.
Emerson Electric (U.S.) Holdng Co.
Emerson Electric (UK) Ltd.
Emerson Electric Canada Ltd.
Emerson Electric GmbH
Emerson Electric Nederland B.V.
Emerson Electric Oversea Finance Co.
Emerson Puerto Rico Inc.
Emerson Europe S.A.
Emersona Finance Co.
Emerson Holding Co.
Emerson Japan Ltd.
Emerson Pacific Pte Ltd.
Emerson Since S.p.A.
Emerson Technologies GmbH & Co.
Emersub XIX Inc.
Emersub XL Inc.
Emersub XLI Inc.
Emersub XLII Inc.

Emersub XXV Inc.
Emersub XXXVIII Inc.
Establissements J. Michael
Establissements Sevener S.A.
Establissements Trepau S.A.
Exac Corp.
Fisco Ltd.
Fisher Controls International Inc.
Fisher-Rosemount B.V.
Flow Technology Inc.
Flow Technology S.A. de C.V.
Fluidocontrol S.A.
France S.A.
Fusite B.V.
Fusite Holding Corp.
Gilmour Inc.
Gilmour Manufacturing Co.
Girard Transmissions S.A.
Hanover Advertising Services Inc.
Hocking NDT Ltd.
IMI Kft.
Industriae Comerco Ltda.
Inno Ven III Corp.
Joucomatic Controls Inc.
Joucomatic S.A.
Kay-Ray/Senall Inc.
Krautkramer Branson Inc.
Krautkramer France S.A>
Krautkramer GmbH
LaFrancaise de Manutention S.A.
Leroy-Somer Maroc S.A.
Leroy-Somer S.A.
Liebert Corp.
Lorraine Services Electrique
Louisville Ladder Corp.

M.I.S. Kerebel Provence S.A.R.L.
M.I.S. Poitouraine S.A.R.L.
M.I.S. Societe Peaucelle
M.L.S. Holice Spol. S.r.o.
MLS. Industries Inc.
MOTODOUR S.A.
Maintenance Industriale Service
Maintenace Industrielle de Vierzon
Maintenance Industries Service
Marcel Oury S.A.R.L.
McGill International Inc.
McGill Manufacturing Co.
Metaloy Inc.
Mezierres S.A.
Micro Motion Inc.
Motores Hermeticos del Sur
Motores U.S. de Mexico S.A.
Naegelen S.A.
Navarre Services S.A.R.L.
Nippon Fisher Co. Ltd.
Omet S.A.
Pl Components Corp.
PEPT Investment Corp.
Poteau Moderne du Sud-Quest S.A.
Prestcold GmbH
Primark DML Inc.
Quest Electro Services S.A.R.L.
Radiel Bobinage S.A.R.L.
Reluctance Motors Ltd.
Ridge Tool (Australia) Pty. Ltd.
Ridge Tool Co.
Ridge Tool Manufacturing Co.
Ridgid Ferramentas E. Maquinas
Ridgid Italia S.r.l.
Ridgid Werkzeuge AG

Ridgid France S.A.
Rosemount Inc.
SWECO Europe S.A.
Skil AG
Societe Anonmye de Mecanique
Societet Commerciale des Ateliers
Societe Con Folentaise de Metalurgie
Societe De Mecanique et D'Electro
Societe DeReparation Electro
Societe Nouvelle Silvain S.A.R.L.
Sotrac S.r.l.
Stresstel Corp.
Sweco Canada Inc.
Switched Reluctance Drivers Inc.
Tata Liebert Ltd.
Taundromeda Beteiligungs GmbH
Tech-Met Canada Co.
Tekmar Co.
Termo-Controles de Juarez
Therm-O-Disc (Canada) Ltd.
Therm-O-Disc Inc.
Transmisiones de Potencia Emerson
U.S.E.M. de Mexico SA de. C.V.
VA Export Co.
VA Holding Co.
VAC Data Management Inc.
VAC Service LP
Valmet-Rosement Inc.
Vermont Am. Corp. Fountain Inn
Vermont American (Australia) Ltd.
Vermont American Canada Inc.
Vermont American Corp.
Vermont Westa Werkzeugbau
Viet Services S.A.R.L.
Western Forge Corp.

Wiegand S.A. de C.V.
Xomox Corp.
Xomox International GmbH
Yorba Linda International Inc.

Subsidiaries of Halliburton

G & H Management Co.
GSI Saudi Arabia Ltd.
Geosource Service Corp.
HGS Enterproses Inc.
Howard Humphreys & Partners Ltd.
Howard Humphreys Group Ltd.
MIHC Inc.
Overseas Marine Leasing Co.
Seaforth Maritime Group Ltd.

Subsidiaries of HFS Inc.

Days Inn of America Incv.
General Franchise Systems Inc.
HFS Gaming Corp.
Parks Inns International Inc.
Ramada Franchise Systems Inc.
Super 8 Motels Inc.
TM Acquisition Corp.
Villager Franchise Systems Inc.

Subsidiaries of Interpublic

A.C.E. Advestising Creation Marketing N.V.
ABM Kershaw Ltd.
Adware Systems Inc.
Alan S. Newman Associates Inc.
Alice SNC France

Allen Brady & March Ltd.
Ammirati & Puris Holdings Inc.
Ammirati & Puris Inc.
Ammirati & Puris Ltd.
Artel Studio Ltd.
Asian Media Corp.
Asset Recovery Group Inc.
Audour, Sounm Larue/Scali, McCabe, Sloves, S.A.
Baader-Lang-Behnken GmbH
Below the Line Agency Ltd.
Benito Advertising Inc.
Boisen & Partners Annonsbyra AB
Boisen & Partners Annonsbyra AB
Boxer Film Production AB
Brilliant Pictures Ltd.
Brindfors Intressenter Invest AB
Brindfors Production Oy
Broadcast Audit Bureau
Brompton Advertising Ltd
Brompton Group Ltd.
Brompton Promotions Ltd.
Bureau of Commercial Information Ltd.
Bureau of Commercial Research Ltd.
Business Science Research Corp. Inc.
C.L.A. Commercial Productions Ltd.
Cabell Eanes Inc.
Campbell Ewald Werbeagnator GmbH
Casablanca Productions
Cato Design Inc.
Centro Media Planning-Buying-Booking s.r.l.
Cinestar S.A.
Clarin, S.A.
Coachouse Ltd.
Colourwatch Ltd.
Colourwheel Ltd.

Creation Sarl
Creative Services GmbH
Daily & Associates
Data Gold B.V.
De Roeck En Heering P.R. Consultants N.V.
De Toffel & PG s.r.l.
Delacroix S.A.
Delacroix et Gervasi S.A.
Deo Nederland B.V.
Direct Creations S.A.
E.C. Television/Paris S.A.
Encuadre S.A.
Epic (Event & Programming Int'l Consultancy) Ltd.
Europa Immagine & Comunicazione s.r.l.
Events & Programming Int'l Consultancy, S.A.
Fab& S.A.
Face Photosetting Ltd.
Fieldplan Ltd.
France C.C.P.M.
FreemantleFulfillment House
GDL Inc.
Goldschmidt Dunst & Lawson Group
Gotham Group Inc.
Harrison Communication, Lt.
Harrisonm Publicidad de Columbia S.A.
Harrod & Mirlin Inc.
Healthcare Capital Inc.
Heinrich Hoffman & Partner GmbH.
Howland Street Studio Ltd.
IPG Nederland B.V.
Impulse International Oy
Inciativas de Medios, S.A.
Inciativas de Meias-Activadades Publicitarias Ltda.
Infernal Sarl
Infoplan (Hong Kong) Ltd.

Infoplan International Inc.
Initiativ Media GmbH
Initiativ Verkaufsforderung GmbH
International Business Services Inc.
International Poster Management Ltd.
Inversionistas Asociados, S.A. de C.V.
JBR Filialen A/S
JBR Films A/S
JBR Invest A/S
JBR Reklamebyra A/S
K&S Werbeagentur Marketing und Consulting GmbH
KenLarton Ltd.
LCF&L Inc.
LFS Inc.
LHSB Management Services Ltd.
Lighthold Ltd.
Link Ajams Limited Sirketi
Lintas
Lowe
Martin Agency Inc.
Max W.A. Kamer AG
Mac W.A. Kamer GmbH
Mac W.A. Kamer GmbH
McCann
McCann-Erickson
McLaughlin
Media Solutions (Proprietary) Ltd.
Merchant and Partners (Sydney) Pty. Ltd.
Merchant and Partners Australia Pty. Ltd.
Message Mediaformedling AB
Milvange/GR2 A/S
Mohr Massey
NRG Vitamins
North Light Ltd.
Orbit International (1990) Ltd.

Orkestra Ltd.
P. Strating Promotion B.V.
P.C.M. Marketing
PCS Wergeantur GmbH
PMI-Mediaporssi
PPA Professionals de Promocao Associados Ltda.
Phillips-Ramsey Co.
Pool Media - PMI S.A.
Pool Media International (P.M.I.) S.r.l.
Pool Media International Aps
Pool Media International S.A.
Poundhold Ltd.
Programming Media International-PMI S.A.
Programming Media International B.V.
Promaction Corp.
Public Media Service
Quest & Associates Inc.
Radio Home Shopping Network
Reclame-Adviesbureau Via B.V.
Relationship Marketing Ltd.
Results Machine Ltd.
Ronnberg & Co. AB
S.C. Advertising (UK) Ltd.
S.F.A. S.A. France
SP3 Conseil S.A.
SP3 Conseil S.A.
SP3 Lyon S.A.
SP3 S.A.
Sales Communications International Pty. Ltd.
Salesdesk Ltd.
Scali, McCabe, Sloves Inc.
Signature APS
Smithfield Lease Ltd.
Specialized Media/Marketing Services Inc.
Sports Call Inc.

Spolink Inc.
Sprint Advertising S.A.
Sprint S.A.
Stenrich Group Inc.
Stowe, Bowden, Wilson Ltd.
Talbot Television Ltd.
Tavistock Advertising Ltd.
Television Marketing Group Inc.
Time Machine Inc.
Tinker (Jack) Advertising Inc.
Triad Assurance Ltd.
Two Six Seven Ltd.
Typo-Wenz Artwork GmbH
US Yellow Pages Inc.
Ulla Anderson Mediaaktiebolag AB
Underline Design Group Pty. Ltd.
Unimedia S.A.
Universal
Universal Ideas S.A.
Universal Media S.A.
Universal s.r.l.
University Sports Connection
Vibalm S.A. France
Werne & Co. Annonsbyra AB
West Can Communications Ltd.
Western
Womena - Myynninvaulhdittajat Oy
ZML Software Systems Inc.
Zet Zet B.V.

Subsidiaries of McDermott International

American Inc.

Babcock Wilcox Industries Limited
Babcock Wilcox Investment Co.
Creole Insurance Co. Inc.
Hudson Engineering Corp.
Hydro Marine Services Inc.
J. Ray McDermott, S.A.
McDermott (Holland) B.V.
McDermott Inc.
McDermott International Investments Co. Inc.
Power Systems Operation Inc.
The Babcock Wilcox Co.
Varsy International N.V.

Subsidiaries of Smith International

Omega II Insurance Ltd.
SI Nederlands B.V.

Subsidiaries of Texaco

American Overseas Petroleum Ltd.
Caltex Petroleum Corp.
Four Star Oil & Gas Co.
Heddington Insurance Ltd.
P.T. Caltex Pacific Indonesia
TEPI Holdings Inc.
RRMI Holding Inc.
Texas Petroleum

Subsidiaries of Textron Inc.

ARS Two Inc.
Avco Community Developers Inc.

Avco Corp.
Avco Financial Services Inc.
Avco Overseas Services Corp.
Avdel PLC
Bell Helicopter Asia (Pte.) Ltd.
Bell Helicopter Services Inc.
Bell Helicopter Supply Center B.V.
Cessna Aircraft Co.
Cessna Finance Corp.
Cone Drive Operations Inc.
Davidson International Services Inc.
Davidson Overseas Investment Inc.
Davidson Textron Inc.
McCord Corp.
Micro-Prescision Operations Inc.
Micromatic Operations Inc.
Paul Revere Corp. (The)
Paul Revere Equity Sales Co.
Paul Revere Investment Mgmt. Co.
Paul Revere Insurance Co.
Paul Revere Protective Life Insurance Co.
Paul Revere Variable Annuity Insurance Co.
Textron Atlantic Inc.
Textron Financial Corp.
Wolverine Metal Specialists Inc.

Subsidiaries of Unocal Corp.

Phillippine Gethermal Inc.
Union Oil Co. of California

Subsidiaries of York Holdings Corp.

Aucgak Undustries S.A.
Bristol Compresors Inc.

Cordonis Acceptance Corp.
Evcon Holdings Inc.
Frigid Coil/Frick Inc.
IMI Kft.
Miller-Picking of Mississippi Inc.

Subsidiaries of Non-U.S Parent Companies

Subsidiaries of Schlumberger Ltd.

Anadrill Holdings Inc.
Darnell Financial Services Ltd.
GECO A.S.
GECO Prakla Inc.
Prakla Seismos AG
Schlumberger B.V.
Schlumberger Technology Corp.
Sedco Forex International Inc.
Sedco Forex Offshore Int'l Ltd.
Triton Holdings Ltd.
Triton Industries Inc.

THE SECRETARY OF STATE

April 17, 1998

Dear Colleagues and Friends,

Welcome to Washington and the Department of State. The theme of your conference is "Are States Necessary?" As Secretary of State, my answer is an emphatic yes! State governments are our partners in keeping America competitive and secure. We count on the states to work with is to promote American exports and investment, to advance our democratic ideals, and to build new partnerships between our people and institutions and the people and institutions of nations, regions and cities all around the world. This kind of engagement in world affairs is essential to keep our economy growing, real wages rising, and inflation under control. The stunning economic success we have already experienced in the last few years is due in no small measure to the partnership between states and the federal government, at home and on the world stage.

State and local governments are now more directly affected than ever by events overseas in areas such as migration, environmental protection, trade and investment. Many states have a particularly important stake in deepening our ties with Mexico and Canada, and are helping to improve cross-border cooperation. That State Department welcomes the role state and local leaders can play in helping to shape our engagement overseas. Indeed, as Secretary of State, I want to do all I can to ensure that Americans are interested in foreign policy, and I view the involvement of our state governments as a welcome expression of public concern.

At the same time, it is important that state and local actions strengthen the President's ability to run an effective and coordinated foreign policy. President Clinton and I recognize the authority of state and local officials to determine their own investment and procurement policies, and the right -- indeed their responsibility -- to take moral considerations into account as they do so. And we certainly share the concerns many stated have expressed about human rights abuses abroad. The Clinton Administration has worked vigorously to promote freedom in nations where it is denied; we have done so through diplomacy, through sanctions where we believe they can be effective, and even, where critical interests are at stake, through force.

Our challenge is to ensure that America speaks with a single voice. That is why we want to work in partnership with you to ensure that state and local actions are effective and consistent with our international obligations, and that they complement the objectives of our foreign policy as well as our efforts to mobilize global support for the goals we share.

Sincerely,

/s/

Madeleine K. Albright

United States Department of State

Washington, D.C. 20520

April 20, 1998

Dear Mr. Chairman:

I understand that the Intergovernmental Relations Committee will hold a hearing April 21, on the Alarcon-Alatorre-Goldberg motion which proposes a review of ordinances enacted by other municipalities restricting business with Burma and the drafting of a similar City of Los Angeles ordinance relative to Burma.

While we recognize and share state and local governments' frustration or even outrage at certain countries' unacceptable behavior, we believe that state and local measures should be addressed with care. Multilateral support and participation are the most effective means of achieving human rights objectives. Ad hoc and scattered actions at various levels of government, however well-intentioned, can do more harm than good in achieving the desired objective. The Administration had similar concerns last year when the state of California was considering a comparable bill regarding Burma.

The State Department would like to work with you and the City of Los Angeles to respond to egregious threats to our national security and to advance our interest in enhancing human rights or in promoting other of our national values. We share the sponsors' concerns about human rights in Burma and the necessary democratic reforms which must take place to improve the lives of the Burmese citizens. That concern is reflected in the numerous actions the Administration has taken to promote change in Burma. Only last year, the President banned new U.S. investment in Burma in addition to sanctions already in place to

spur the repressive regime in Burma.

We are serious in our offer to speak with you to discuss any ideas you might have on how we can work together to address our shared concerns about Burma or any other foreign policy issue. Through a cooperative dialogue, we can more effectively reach our shared goal of democratic and human rights reform in Burma. As background to the Administration's position, please find attached a copy of the testimony delivered on October 28,1997, to the California State Assembly by David Marchick, Deputy Assistant Secretary (DAS) for Trade Policy and Programs. The testimony outlines some of the concerns that the Department had with the draft bill in California. We hope this information will be helpful to you and the members of the Committee. We look forward to hearing from you on the deliberations of this motion. Please contact Mr. Marchick or me at (202) 647-2532 directly with any questions or information you would like to share regarding the motion. We would appreciate your entering on the record this letter and attached testimony.

Sincerely,

/s/ Alan P. Larson

Assistant Secretary

Bureau of Economic and Business Affairs

Councilman Nate Holden

Chairman, Intergovernmental Relations Committee

Los Angeles City Council

City Hall East, Room 317

200 N. Main Street Los Angeles, CA 90012 ***

Statement by Stuart E. Eizenstat

U.S. Under Secretary of State for Economic, Business and Agricultural Affairs

Before the Hevesi Committee

July 1, 1998

I am grateful for the opportunity today to express once again the views of the U.S. Government on these important issues being considered by New York City Comptroller Alan Hevesi and his committee colleagues from state and local entities from across the country. We respect the Committee's process and we share their determination that justice be done. While we share this common purpose, the U.S. Government is also determined to see that justice be achieved promptly and in ways that maintain both the openness of our nation's financial markets and a positive relationship between the United States and Switzerland.

Since last December, at the request of both sides, I have convened intensive talks in an effort to facilitate a settlement of the class action suits by Holocaust victims against the three major Swiss banks. We have met on about a dozen separate occasions in formal discussions together with innumerable other efforts to find a just settlement. The parties have made significant progress in agreeing on a detailed structure for a potential settlement, in obtaining a coordinated negotiating position by the plaintiffs' attorneys and major NGOs, and in achieving some narrowing of major differences on the settlement amount. But they have not been able to bridge their remaining differences at this time.

No one is more disappointed than my U.S. Government colleagues and I that the parties were not able to reach an agreement given the amount of time, effort and energy all of us, including the parties, have put into this, and most importantly, the profound matters at stake in this litigation. We fully appreciate the important issues raised in these cases by the plaintiffs, many of whom are U.S. citizens. These talks presented an historic opportunity for resolving this matter that may not come again soon. The alternative of lengthy and contentious litigation serves no one's interests. Given this, we call upon the parties to reflect on the consequences of protracted litigation: it means a delay in achieving a measure of justice for the unique class of aging and frail Holocaust survivors who would most benefit from a just and prompt settlement; and it represents a missed opportunity for a major step toward closure of a difficult chapter in Switzerland's history.

Consistent with the terms of the confidentiality agreement governing these talks and my role as a neutral facilitator in this process, we will not comment further on the status or conduct of the talks.

We hope that this missed opportunity will not lead to recriminations and hardening of positions on both sides. This matter is before a federal court and should be resolved there if it cannot be resolved through the mutual agreement of the parties.

These developments also put added importance on the need for a thorough and prompt conclusion to the Volcker process of reviewing dormant accounts in Switzerland that may have belonged to Holocaust victims, to which Chairman Volcker and his Committee are committed.

The U.S. Government favors a just and prompt resolution of the issues at stake with the three major Swiss banks and other Swiss institutions. Sanctions - however well - intentioned or carefully calibrated - will not make it easier to achieve closure in this complex and sensitive matter. We believe that state and local sanctions in this matter are wrong both in principle and practice: wrong in principle because our nation should speak with one voice in matters of foreign policy and international commerce and because they are not warranted; wrong in practice because they may be counter-productive and fail to advance the goal of a prompt and just settlement.

Far from compelling the banks to do more, the imposition of sanctions may lead to an opposite reaction which will delay still further the resolution of these issues. Even the threat of sanctions has reinforced an unfortunate climate of inflexibility in Switzerland. While Switzerland is undertaking a comprehensive series of steps to address Holocaust-era issues, it must continue on this positive course if it is to achieve closure. Imposing sanctions would make it more difficult for all Swiss institutions to do so.

Moreover, we must safeguard the preeminence of the United States as the most open financial market in the world. By imposing sanctions such as those under consideration, New York City and other jurisdictions would risk endangering not only competitiveness in attracting and retaining world-class firms and the income they generate and the jobs they support, but also call into question the openness and attractiveness of all American financial markets.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NATIONAL FOREIGN TRADE COUNCIL,
Plaintiff, v.

CHARLES D. BAKER, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, in his official capacity as State Purchasing Agent for the Commonwealth of Massachusetts.

No. 98CV-10757-JLT

AFFIDAVIT OF KATHLEEN MOLONY

I, Kathleen Molony, under oath state as follows:

1. I am Acting Executive Director of the Massachusetts Office of International Trade and Investment (MOITI). I have held that position since March 30, 1998. Prior to my appointment as Acting Executive Director, I was Deputy Executive Director. MOITI is an executive agency of the Commonwealth of Massachusetts. The powers and duties of MOITI are set forth in Massachusetts General Laws ch. 23A, §§ 23A-28. Copies of these laws are attached as Ex. A. The primary purposes of MOITI are to help Massachusetts companies increase their business in international markets and to seek international investment in Massachusetts.

2. MOITI provides services to Massachusetts

companies with international business interests. These services include:

-- the introduction of Massachusetts companies to important international markets through trade missions and shows;

-- consultations with Massachusetts companies on international trade;

-- the management of visits by foreign trade delegations to Massachusetts. MOITI also manages (with the Massachusetts Port Authority) three overseas trade offices in Jerusalem, Berlin, and Guangzhou, and a trade representative in Mexico City. These trade representatives gather international market data and introduce Massachusetts businesses to officials of foreign governments. They also assist foreign companies that wish to invest in Massachusetts.

3. I attach as Exhibit B a true copy of a summary of trade missions for Massachusetts companies led by MOITI during the years 1991-1997. During that period, MOITI organized twenty-three trade missions and visited forty-two countries (including Hong Kong). A total of more than four hundred Massachusetts firms attended these trips. These firms included Digital Equipment Corp., Raytheon Co., IBM Corp., BankBoston, Polaroid Corp., Genzyme, Deloitte and Touche, Shiva Corp., Donaldson, Lufkin & Jenrette, Ernst & Young, Gillette Co.,Goldman Sachs & Co., Fidelity Investments, and KPMG Peat Marwick.

4. Massachusetts has twenty-three "sister-state" and other bilateral agreements with foreign governments or trade promotion organizations. These agreements promote trade and other activities between Massachusetts and these governments and organizations. A list and summary of these agreements is attached as Exhibit C. True copies of examples of these agreements with foreign governments are attached as Exhibit

D.

5. I attach as Exhibit E a true copy of the 1997 report of MOITI.

6. To the best of my knowledge, the statements in each of the attached exhibits are true.

Signed under the pains and penalties of perjury this ____ day of May, 1998.

/s/ Kathleen Molony Executive Director

Congress of the United States
Washington, DC 20515

July 22, 1998

Charlene Barshefsky
U.S. Trade Representative
Winder Building, Room 201
600 17th Street, NW
Washington, D.C. 20508

Dear Ambassador Barshefsky,

As members of the U.S. Congress from the State of Massachusetts, we are deeply disturbed by the decision by the European Union and Japan to formally challenge the Massachusetts Burma selective purchasing law at the World Trade Organization (WTO).

We are wholly supportive of fostering good relations between Europe, Japan and the United States. However, we strongly believe that it is highly inappropriate for the European Union and Japan to involve themselves in the internal affairs of Massachusetts. It is not the place of the European Union and Japan to dictate how the Massachusetts legislature and state government should spend its own taxpayers' money. The people of Massachusetts have long vested the power to levy taxes and spend public money with our elected representatives, not European and Japanese bureaucrats.

We also note that the Massachusetts Burma selective purchasing law is strongly supported by the legitimate leader of the Burmese democracy movement, Aung San Suu Kyi. The

leader of the party that won the 1990 Burmese elections, Aung San Suu Kyi remarked in a recent interview that selective purchasing laws are very effective means of restoring democracy in Burma. She also specifically praised the Massachusetts Burma law.

We fear that, by placing European and Japanese corporate interests first, the European Union and Japan risk undermining their principled stand against the Burmese military junta. In March, the European Commission revoked Burma's tariff preferences because of the military junta's pervasive use of forced labor. The new British government recently cut its support for trade promotion in Burma and has "not ruled out the possibility of further measures, including economic sanctions" against the illegal military junta. Japan has called for dialogue between the military junta and the democracy movement.

Opinion in Europe in particular towards business in Burma is best typified by the recent and unanimous resolution on Burma passed by the European Parliament. The resolution called on the European Union to enact economic sanctions on Burma. Moreover, in its resolution, the European Parliament specifically urged the European Commission not to take action against the Massachusetts Burma law under the WTO dispute settlement procedures.

We ask the U.S. Trade Representative to weigh the support for the Massachusetts Burma law from the peoples of Europe, Japan, Massachusetts and, most importantly, Burma itself. We strongly urge the U.S. Trade Representative to oppose the unfair and inappropriate efforts by the European Union and Japan to force Massachusetts to amend its Burma law.

Rep. Barney Frank

Rep. Richard Neal

Rep. Edward Markey
Rep. Joseph Moakley
Rep. Joseph Kennedy
Rep. John Olver
Rep. Martin Meehan
Rep. James McGovern
Rep. John Tierney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 98-CV-10757 (JLT)

NATIONAL FOREIGN TRADE COUNCIL,)
)
Plaintiff,)
)
-v.-)
)
CHARLES D. BAKER, in his official capacity)
as Secretary of Administration and Finance of)
the Commonwealth of Massachusetts, and)
PHILMORE ANDERSON, III, in his official)
capacity as State Purchasing Agent for the)
Commonwealth of Massachusetts,)
Defendants.)

JOINT STIPULATION

Plaintiff, the National Foreign Trade Council ("NFTC") and defendants Charles D. Baker and Philmore Anderson, III

(collectively, "defendants") hereby agree and stipulate to the facts set forth below. Each party reserves its right to object to the relevance and/or materiality of any fact to which that party has stipulated.

1. Because defendants reside in this judicial district,and because the events giving rise to the claims made in this lawsuit occurred in this judicial district, this judicial district is the proper venue for this lawsuit.

2. Plaintiff NFTC is a nonprofit corporation, organized and existing under the laws of the State of New York. Founded in 1914, the NFTC has historically represented its members' interests in the area of foreign trade.

3. The NFTC's membership consists of approximately 580 United States manufacturing corporations, financial institutions, and other United States firms having substantial international operations or interests. A true and correct copy of the NFTC's membership list as of the date of this stipulation is attached hereto as Exhibit 1.

4. The NFTC is authorized by its members to represent their interests in international-trade-related matters before Congress, the Executive Branch, the regulatory agencies, and the courts.

5. The NFTC's Board of Directors has adopted a

resolution that authorizes the NFTC, on behalf of its members, to bring suit to challenge laws like the Massachusetts Burma Law. A true and correct copy of that resolution is attached hereto as Exhibit 2, and a true and correct listing of the NFTC's Board of Directors as of the date of this stipulation is attached hereto as Exhibit 3.

6. The Massachusetts Burma Law was signed into law on June 25, 1996 and became effective 90 days later, on September 29, 1996.

7. The Massachusetts Burma Law is currently being enforced.

8. Defendant Charles D. Baker is Secretary of Administration and Finance of the Commonwealth of Massachusetts. Defendant Baker has supervisory authority over the setting of procurement standards and the exercise of procurement authority over Massachusetts state agencies that collectively purchase at least $2 billion in goods and services annually. Defendant Philmore Anderson, III has operational authority over the same setting of procurement standards and exercise of procurement authority.

9. Defendant Baker is responsible by statute for establishing and maintaining the "Restricted Purchase List" required by the Massachusetts Burma Law, and for providing

that list to state agencies and authorities required to comply with the Law. Under M.G.L.A. ch. 7, § 22J(a), the "restricted purchase list shall contain the names of all persons currently doing business with Burma (Myanmar)." If the Massachusetts Burma Law were declared by a court of competent jurisdiction to be unconstitutional, or its enforcement enjoined by such a court, defendant Baker would no longer maintain the Restricted Purchase List, nor would he provide it to any state agency or authority.

10. Defendants Baker and Anderson have the authority to promulgate regulations, applicable to any Executive Office, Department, Agency, Office, Division, Board, Commission, or Institution within the Executive Branch of the Commonwealth of Massachusetts, as those terms are defined in 801 CMR § 21.01(2) and 21.02, unless otherwise provided by law, that ensure compliance with the Massachusetts Burma Law and certain other procurement-related statutes.

11. Defendant Baker has the authority to determine whether, for an agency (or a particular project) over which he has authority, the Massachusetts Burma Law supersedes the general competitive bidding requirements set forth in the Code of Massachusetts Regulations, 801 CMR § 21.06.

12. If defendants Baker and Anderson were enjoined from enforcing the Massachusetts Burma Law by a

court of competent jurisdiction, or the Law were declared unconstitutional by such a court, defendants would advise state agencies under their authority or supervision that they would be required to follow the competitive bidding requirements set forth in the Code of Massachusetts Regulations, 801 CMR § 21.06, notwithstanding the provisions of the Massachusetts Burma Law.

13. Defendants are required by the Massachusetts Burma Law to prepare an annual report detailing compliance with the Massachusetts Burma Law, and to file that report with the respective clerks of the Senate and House of Representatives of the Commonwealth. If defendants were enjoined from enforcing the Law by a court of competent jurisdiction, or if the Law were declared unconstitutional by such a court, they would no longer prepare and/or file that report.

14. Defendant Anderson is responsible for preparing the Commonwealth's Procurement Policies and Procedures Handbook. A true and correct copy of relevant excerpts from the Commonwealth's most recent Procurement Policies and Procedures Handbook is attached hereto as Exhibit 4. Defendants have the authority to require, and have required, individuals within agencies under the defendants' supervisory authority to follow this handbook in exercising procurement authority. The most recent version of the handbook includes provisions designed to ensure compliance with the Massachusetts Burma Law. If defendants were enjoined from enforcing the Law by a court of competent jurisdiction, or the

Law were declared unconstitutional by such a court, defendants would no longer include provisions designed to ensure compliance with it in the Commonwealth's Procurement Policies and Procedures Handbook.

15. Defendant Baker has supervisory authority over procedures for the procurement of commodities or services, as set forth in the Code of Massachusetts Regulations, 801 CMR §§ 21.01 and 21.02. If defendant Baker were enjoined from enforcing the Massachusetts Burma Law by a court of competent jurisdiction, or the Law were declared unconstitutional by such a court, he would no longer enforce that law with respect to these types of procurements of commodities or services.

16. Defendant Philmore Anderson, III, is the State Purchasing Agent for the Commonwealth of Massachusetts. In this position, defendant Anderson heads the Operational Services Division, which is charged with the duties and obligations established by M.G.L.A. ch. 7, § 4A(a). Defendant Anderson is responsible — either directly or through delegation — for procuring goods and services for the Commonwealth's administrative and executive departments. This purchasing activity amounts to at least approximately $2 billion per year. Unless enforcement of the Massachusetts Burma Law is enjoined, or it is declared unconstitutional, Anderson is obligated to enforce the Massachusetts Burma Law in making the purchases subject to the Law. If the

Massachusetts Burma Law were enjoined by a court of competent jurisdiction or held unconstitutional by such a court, he would no longer apply that Law to these purchases.

17. The state agencies or authorities (as those terms are defined in the Massachusetts Burma Law, 7 Mass. Gen. Laws § 22G) that fall under defendants' authority and over which they exercise procurement authority are all Executive Offices, Departments, Agencies, Offices, Divisions, Boards, Commissions, or Institutions within the Executive Branch of the Commonwealth of Massachusetts, as those terms are defined in 801 CMR §§ 21.01(2) and 21.02. Unless enforcement of the Massachusetts Burma Law is enjoined by a court of competent jurisdiction, or it is declared unconstitutional by such a court, defendants are obligated to apply that Law to procurements sought by these agencies. If defendants were enjoined from enforcing the Massachusetts Burma Law, or the Law were declared unconstitutional, they would no longer apply that Law to procurements sought by these agencies.

18. The transcript of the legislative debates attached hereto as Exhibit 5 is a true, complete and accurate transcription (with the exception of non-material errors) of the Massachusetts House Debate regarding H2833, which took place on July 19, 1995, and of the Massachusetts Senate Debate regarding H2833, which took place on March 20, 1996.

19. A true and correct copy of then-Governor

William Weld's June 25, 1996 signing statement regarding the Massachusetts Burma Law, Commonwealth of Massachusetts, Executive Department Press Release, is attached hereto as Exhibit 6.

20. The Massachusetts Burma Law restricts state agencies from purchasing goods or services from any company "doing business with Burma (Myanmar)" as those terms are defined by the Law. As described in Paragraph 9, above, these companies are placed on the restricted purchase list. The Law requires that "in establishing the restricted purchase list, the Secretary shall consult United Nations reports, resources of the Investor Responsibility Research Center, the Associates to Develop Democratic Burma, and other reliable sources." This list is referred to as the "Restricted Purchase List."

21. In creating the Restricted Purchase List, the Commonwealth obtained a list of companies believed to be doing business in Burma (Myanmar) from the Investor Responsibility Research Center. Commonwealth personnel then compared the activities of each company on the list with the statutory definition of doing business with Burma (Myanmar), and made a preliminary assessment as to which companies should be placed on the list. The Commonwealth then sent a letter signed by defendant Anderson to each such company to inform the company that it would be placed on the list, and gave the company the opportunity to provide affidavits or other documentation to convince the Commonwealth that it

should not be placed on the list. In some cases, representatives of such companies met with Commonwealth personnel to discuss their proposed placement on the list. After receiving the company's response, if any, the Commonwealth made a final decision as to whether to place an individual company on the Restricted Purchase List. As the list is updated, the Commonwealth follows this same procedure with respect to companies that it intends to add to the list. To date, no company has sought judicial review of a determination by the Commonwealth that it is doing business with Burma (Myanmar). In their review of the possible placement of companies on the list, Commonwealth officials have not reviewed Burmese law or judged the credibility of Burmese officials.

22. In response to letters received by defendant Anderson informing them that the Commonwealth intended to place them on the Restricted Purchase List, dozens of companies submitted written objections, some of which included sworn affidavits, requesting either that they be removed from, or not be placed on, the List. Defendant Anderson decided whether or not such companies should remain on the List, and though a number were either removed from, or never placed on, the List, a number of these objecting companies are still listed.

23. In response to letters received from defendant Anderson informing them that the Commonwealth intended to

place them on the Restricted Purchase List, at least seven companies, of which at least three were NFTC members, specifically informed the Commonwealth (by letter and affidavit) that they were terminating all business ties with Burma (Myanmar) in order to comply with the Massachusetts Burma Law, and that they therefore wished to remain off the Restricted Purchase List. (True and correct copies of correspondence from these companies to the Commonwealth are attached hereto as Exhibits 7 through 13.) The Commonwealth removed all seven of these companies from the Restricted Purchase List. The three NFTC members that were removed from the List had previously bid on and received Massachusetts contracts with state agencies under the defendants' supervision, and they specifically advised Massachusetts that they should not appear on the Restricted Purchase List because they ceased (or, in one case, because a subsidiary ceased) doing business in Burma (Myanmar) as a result of the Massachusetts Burma Law.

24. The Restricted Purchase List released in April 1998 is the latest version of the list that defendant Charles Baker is required by statute to maintain. That list contains all companies known to the Commonwealth that are "doing business with Burma" as that phrase is defined by M.G.L.A. ch. 7, § 22G. The Commonwealth of Massachusetts does not distribute the Restricted Purchase List directly to other state or local governments or private parties; however, the Restricted Purchase List is a public record under Massachusetts law and is available on the Internet and upon request. (A true and correct

copy of the April 1998 version of the Restricted Purchase List is attached hereto as Exhibit 14.)

25. Currently, 346 companies appear on the restricted purchase list. Forty-four of these are companies domiciled in the United States; 15 of the 44 are Fortune 500 companies, whose total combined annual revenue is over $246 billion. Many foreign companies with U.S. subsidiaries and affiliates also appear on the restricted purchase list.

26. Under current Commonwealth procurement law and policy, when Massachusetts agencies solicit or accept bids for contracts, they are required to obtain, and have obtained, from the person seeking to provide those goods or services a statement under penalty of perjury detailing the nature and extent of that person's business ties with Burma (Myanmar), if any.

27. Under current Commonwealth procurement law and policy, a Massachusetts agency soliciting a contract can award the contract to a company on the Restricted Purchase List only if that agency certifies in writing both that the procurement is essential and that compliance with other provisions of the Massachusetts Burma Law would eliminate the only bid or offer, or would result in inadequate competition.

28. Under current Commonwealth procurement law

and policy, an agency soliciting a contract can award the contract to a company doing business in Burma (Myanmar) only if there is no comparable low bid or offer by a company that is not on the Restricted Purchase List.

29. Under current Commonwealth procurement law and policy, when a bid or offer is submitted by a company on the restricted purchase list, agencies subject to the Massachusetts Burma Law are required to automatically add, and have added, ten percent to the offer, and that offer is considered to have been at the higher price for the sole purpose of comparing the offer with other bids.

30. Thirty-four NFTC members are listed on the Massachusetts "Restricted Burma Purchase List" released in April 1998.

31. These thirty-four NFTC members are: Atlantic Richfield Co.; Carlson Holdings Inc.; Caterpillar; Emerson Electric Co.; Halliburton Co.; Johnson & Johnson Inc.; McDermott International; Procter & Gamble Co.; Smith International Inc.; Texaco; Textron Inc.; Unocal Corp.; United Technologies Corp.; ABB Asea Brown Boveri Ltd.; ABN Amro Bank Ltd.; Bank of Tokyo-Mitsubishi Ltd.; British Petroleum Co. PLC; Broken Hill Proprietary Co. Ltd.; Credit Agricole (Caisse Nationale du); Honda Motor Co.; ING Bank International; Matsushita Electric Industrial Co.; Michelin, Cie. Generale des Establissements; Mitsubishi Corp. International; Mitsui & Co. Ltd.-U.S.A.; Nestle S.A.-U.S.A.; Nissan Motor

Co. of North America; Northern Telecom Ltd.; Sharp Corp.; Shell Transport & Trading Co. PLC; Siemens AG-U.S.A.; Sony Corp. of America; Standard Chartered Bank; and Toyota Motor Corp. - Sales U.S.A.

32. At least one of the NFTC's individual member companies that has bid on and been awarded contracts with Massachusetts state agencies under defendants' supervisory authority prior to the enactment of the Massachusetts Burma Law would have bid for the opportunity to provide further goods or services to the Commonwealth of Massachusetts, but did not do so because of its knowledge of the Commonwealth's current practice of automatically increasing by ten percent the offer price of those bids submitted by companies on the Restricted Purchase List. Members of the NFTC believe that preparing a contract bid for agencies or authorities of the Commonwealth of Massachusetts is expensive.

33. As of the date this stipulation is entered, apart from the situation described in paragraph 38, so far as NFTC is aware, no company that is a member of the NFTC has made any bid with any procurement agency within defendants' supervisory authority that was increased by ten percent because that company was listed on the Restricted Purchase List or because that company does business with Burma (Myanmar).

34. As of the date this stipulation is entered, the NFTC knows of no contract with any state agency under

defendants' supervisory authority, where an NFTC member submitted a bid and the contract was not awarded to a current NFTC member because that member was on the Restricted Purchase List, although one company's bid was increased by ten percent as described in paragraph 38.

35. Under the Commonwealth's procurement policy and practice, price is frequently a significant factor considered in deciding whether to award a contract, although other factors are also frequently considered to be significant.

36. At least three of the NFTC's individual member companies severed business ties with Burma (Myanmar) after the enactment of the Massachusetts Burma Law citing the Massachusetts Burma Law as the reason for that decision. Prior to the Law's enactment, these companies engaged in substantial business both with and in Burma (Myanmar). Discontinuation of such business is not required by any federal law or executive order. These same individual NFTC members have in the past entered into contracts with Massachusetts state agencies within defendants' jurisdiction, and intend to bid on such contracts in the future. These companies believed that they would lose future business with Massachusetts as a result of the Massachusetts Burma Law if they did not sever business ties with Burma (Myanmar).

37. Two other of the NFTC's individual member companies severed business ties with Burma (Myanmar) citing human rights issues in Burma (Myanmar), as set forth in

Exhibits 30 and 31, attached.

38. Pursuant to the Massachusetts Burma Law, procurement bids made on Statewide Photocopier Contract No. OFF-02 by three companies on the Restricted Purchase List were increased by ten percent during the process of evaluating those bids. None of those companies was a member of the NFTC as of the date of the bids or the date of the awards. One of those companies is a member of the NFTC as of the date of this stipulation.

39. On at least one occasion, the Massachusetts Water Resources Authority rejected all bids received on two contracts (Contract Nos. 6354 and 6355) after those bids had been reviewed and analyzed because the bid solicitation did not include notice of the Massachusetts Burma Law, and because the Authority failed to obtain certifications, under penalty of perjury, from the bidders to the effect that they were not doing business in Burma (Myanmar), as required by the Massachusetts Burma Law.

40. A true and correct copy of a letter from European Union ("EU") Ambassador Hugo Paeman to then-Governor Weld, is attached hereto as Exhibit 15.

41. On June 20, 1997, the EU formally noted its position that the Massachusetts Burma Law violated the World

Trade Organization's ("WTO") "Government Procurement Agreement," to which the United States is a signatory. United States — Measure Affecting Government Procurement: Request for Consultations by the European Commission, World Trade Organization (WT/DS88/1), June 20, 1997. (A true and correct copy of this document is attached hereto as Exhibit 16.)

42. On July 18, 1997, Japan formally noted its position that the Massachusetts Burma Law violates the Government Procurement Agreement and requested WTO consultation on its claim. *See* United States — Measure Affecting Government Procurement: Request to Join Consultations Communication from Japan, World Trade Organization (WT/DS95/1), July 18, 1997. (A true and correct copy of this document is attached hereto as Exhibit 17.)

43. To date, Massachusetts remains the only state to have enacted a selective purchasing law applicable to companies that do business in or with Myanmar.

44. Eighteen municipal jurisdictions impose similar restrictions. *See* Organization for International Investment, *State and Municipal Sanctions Report*, Dec. 1, 1997, at 3. (A true and correct copy of this report is attached hereto as Exhibit 18.) Dozens of local jurisdictions have either considered or passed similar restrictions aimed at companies doing business with countries other than Myanmar. *Id.* at 1-2, 3.

45. Each year the agencies and authorities under the defendants' supervisory authority purchase at least approximately $2 billion of supplies and services. These purchases are covered by the Massachusetts Burma Law.

46. Foreign trade with the Union of Myanmar generates nearly $2.3 billion in revenues each year. The country is a major source of products such as oil, gas, and timber.

47. Some number of companies historically have done business with the Commonwealth of Massachusetts and with or within Myanmar.

48. Certain NFTC members have, on occasion, directly encouraged legal reforms in foreign countries and, where warranted, have presented positions to international organizations. On occasion, certain NFTC members have asked foreign governments to change their laws and practices concerning child labor.

49. Certain NFTC members have bid for contracts to provide goods or services to, and have sought governmental permits from, foreign countries, including Burma (Myanmar).

50. Certain NFTC members have bid for contracts

to provide goods or services to companies or individuals in foreign countries, including Burma (Myanmar).

****

51. A true and correct copy of the Investor Responsibility Research Center's publication entitled "Country-Specific State and Local Selective Purchasing Laws As of September 1997" is attached hereto as Exhibit 19.

52. A true and correct copy of notes from Commonwealth Representative Byron Rushing's September 25, 1997 Remarks at the Burma Seminar in Stockholm, Sweden is attached hereto as Exhibit 20.

53. A true and correct copy of an article by Michael Grunwald appearing in the February 1, 1997 edition of *The Boston Globe* entitled *Trade Tiff Widens Over State 'Burma Law'* is attached hereto as Exhibit 21.

54. A true and correct copy of an article by Isagani de Castro published on July 28, 1997 by Inter Press Service entitled *South-east Asia: Despite its Weight, ASEAN Carries Burma* is attached hereto as Exhibit 22.

55. A true and correct copy of the July/August 1997 Foreign Policy Bulletin entitled *U.S. Imposes Ban on New Investment in Burma; E.U., ASEAN Fail To Follow* is attached

hereto as Exhibit 23.

56. A true and correct copy of an article entitled *Democracy Activist Urges Sanctions Against Burma* that appeared in *The Boston Globe* on July 19, 1996 is attached hereto as Exhibit 24.

57. A true and correct copy of an article by Alistair Horne entitled *Battle In Burma* that appeared in the *Wall Street Journal* on March 25, 1997 is attached hereto as Exhibit 25.

58. A true and correct copy of a letter from the Massachusetts Congressional delegation to U.S. Trade Representative Charlene Barshefsky dated July 22, 1998 is attached hereto as Exhibit 26.

59. A true and correct copy of Minutes from the February 19, 1998 Sitting of the European Parliament is attached hereto as Exhibit 27.

60. True and correct copies of several documents produced to the Commonwealth by the NFTC are attached hereto as Exhibit 28.

61. True and correct copies of excerpts from a report by the United States Department of Labor entitled *The*

Apparel Industry Codes of Conduct: A Solution to the International Child Labor Problem? are attached hereto as Exhibit 29. The full report appears at http://www.ilr.cornell.edu/library/e-archive/ChildLabor.

62. A true and correct copy of a letter dated June 22, 1992 from Sabrina Johnson, Levis Manager, Corporate Communications, to C.B. Loeb, Franklin Research and Development, is attached hereto as Exhibit 30.

63. A true and correct copy of a letter dated October 12, 1994 from Sarah Patterson, Liz Claiborne, Inc. Director of Public Relations, to Simon Billenness, Senior Analyst at the Franklin Research Development Corporation, is attached hereto as Exhibit 31.

64. A true and correct copy of a transcript of Secretary of State Madeleine K. Albright's July 23, 1997 Address and Question and Answer Session to The Pacific Council on International Policy and The Los Angeles World Affairs Council is attached hereto as Exhibit 32.

65. A true and correct copy of an article entitled *USA-Engage Outlines Possible Challenge of Massachusetts Burma Law* that appeared in the August 15, 1997 issue of *Inside U.S. Trade* is attached hereto as Exhibit 33.

66. A true and correct copy of a letter from the Massachusetts Congressional Delegation to Japanese Prime Minister Hashimoto dated February 3, 1997 is attached hereto as Exhibit 34.

67. A true and correct copy of an article by Yawu Miller entitled *State Rep. is on Front Line of Burma Struggle* that appeared in the October 9, 1997 issue of The Ethnic Newswatch is attached hereto as Exhibit 35.

68. A true and correct copy of a February 28, 1995 letter from Rep. Byron Rushing to Rep. Christopher Hodgkins and Sen. Warren Tolman, Committee on State Administration, Feb. 28, 1995 is attached hereto as Exhibit 36.

69. A true and correct copy of selected excerpts of Under Secretary of State Stuart Eizenstat's June 25, 1997 statements before the House Committee on Banking and Financial Services of the 105th Congress is attached hereto as Exhibit 37.

70. A true and correct copy of Under Secretary of State Stuart Eizenstat's October 23, 1997 testimony before the Trade Subcommittee, House Committee on Ways and Means is attached hereto as Exhibit 38.

71. A true and correct copy of Deputy Assistant Secretary of State David Marchick's October 28, 1997 testimony before the California State Assembly regarding proposed (but ultimately failed) California legislation targeting companies that do business in Myanmar is attached hereto as Exhibit 39.

72. A true and correct copy of Deputy Assistant Secretary Marchick's March 25, 1998 testimony before the Maryland House of Delegates' Committee on Commerce and Government Matters is attached hereto as Exhibit 40.

73. A true and correct copy of an April 20, 1998 letter from Alan P. Larson, Assistant Secretary, Bureau of Economic and Business Affairs, U.S. Department of State to Los Angeles City Councilman Nate Holden regarding a proposed City of Los Angeles ordinance relative to Myanmar is attached hereto as Exhibit 41.

74. A true and correct copy of a July 1, 1998 Statement by Stuart E. Eizenstat, U.S. Under Secretary of State for Economic, Business and Agricultural Affairs, before the Hevesi Committee, is attached hereto as Exhibit 42.

75. A true and correct copy of excerpts from the July 6, 1998 remarks of U.S. State Department Spokesperson Jamie Rubin is attached hereto as Exhibit 43.

Dated: July 24, 1998

Respectfully submitted,

Thomas A. Barnico
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2086

Michael A. Collora
Dwyer & Collora
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210-2211
(617) 371-1000

Timothy B. Dyk
Robert H. Klonoff
Gregory A. Castanis
Jacqueline M. Holmes
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

Attorneys for Plaintiff
National Foreign Trade Council

TRANSCRIPT OF HEARING

U.S. DISTRICT COURT (D. MASS.),

(September 23, 1998)[Original Transcript Pages 12-13]

NATIONAL FOREIGN

TRADE COUNCIL v. BAKER

C.A. No. 98-10757-JLT

THE COURT: Let me ask you a question. It may be of absolutely no significance, but it comes to my mind. You mentioned something earlier in your argument, at least I think you did, that the state might even be barred from a resolution that touched on foreign affairs. Suppose that resolution was in support of the national policy -- in other words, praising the President or the congress for banning participation with Burma -- pick whatever subject you want -- is there a difference if the state is agreeing with the Federal Government, as opposed to prodding the Federal Government over disagreeing with them?

MR. DYK: I don't think it is so much a distinction between whether the state is agreeing or disagreeing with the Federal Government, because the key issue here is whether what the state does is attempting to make foreign policy, and I think, under some circumstances, a mere resolution could be making foreign policy. I think at least statements by Under Secretary Eizenstat and Deputy Assistant Marchick are clear that the whole issue of sanctions and how far to go and what to

say is a very critical element of foreign policy, and that you have to have one entity is the United States Government.

So, even if you have a resolution with no sanctions attached to it, which, of course, is not this case, even if you had a resolution purported to agree with the position of the United States. There are nuances here, and foreign policy is a very delicate matter. It requires flexibility and expertise, which the state simply does not have.

It does not have the foreign policy establishment. It requires the ability to change quickly, rather than to have a situation where the policy is written in stone. And, for all of those reasons, even if there is some parallelism between the state policy and the federal policy, that does not mean that it is not intruding into the area of foreign affairs.

THE COURT: In any event, this is more than a resolution.

MR. DYK: It is far more that a resolution. It is a traditional exercise of foreign policy making. It is condemning a foreign country and imposing sanctions.

Jan 12 2000

(9)

Supreme Court, U.S.
FILED
JAN 12 2000
CLERK

No. 99-474

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

QUESTIONS PRESENTED

A Massachusetts statute -- the "Massachusetts Burma Law" -- limits the authority of state agencies (but not private persons) to buy goods and services from persons who do business with Burma. This type of law is known as a "selective purchasing law." The questions presented are:

1. Whether economic sanctions against Burma enacted by Congress in 1996 -- three months after enactment of the Massachusetts Burma Law -- implicitly permit, or preempt, state and local selective purchasing laws regarding Burma.

2. Whether selective purchasing laws such as the Massachusetts Burma Law represent "market participation," not regulation, and are therefore exempt from claims based on the Foreign Commerce Clause and the foreign affairs power of the federal government.

3. Whether selective purchasing laws such as the Massachusetts Burma Law unconstitutionally interfere with the power of the federal government to conduct foreign affairs.

4. Whether selective purchasing laws such as the Massachusetts Burma Law discriminate against foreign commerce in violation of the Foreign Commerce Clause.

PARTIES TO THE PROCEEDING

The plaintiff-respondent is the National Foreign Trade Council, Inc. (NFTC). According to the NFTC, it is a "nonprofit corporation; it issues no stock and has no parent corporations, subsidiaries or affiliates." The petitioner-defendants are Andrew S. Natsios, the Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson, III, the state purchasing agent of the Commonwealth of Massachusetts. The defendants are sued solely in their official capacities.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 181 F.3d 38 (1st Cir. 1999) and appears at Pet. App. 1-73. The decision of the United States District Court is reported at 26 F. Supp.2d 287 (D. Mass. 1998) and appears at Pet. App. 75-87.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1999. Pet. App. 74. No rehearing or rehearing *en banc* was sought. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Petitioners invoked and the court of appeals found jurisdiction pursuant to 28 U.S.C. § 1291. Petitioners no longer contest the standing of plaintiff-respondent to maintain this case. *See* Pet. App. 14 n.6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

The Congress shall have Power . . . [t]o provide for the common Defence . . .; [t]o regulate Commerce with foreign Nations . . . ; [t]o establish an uniform Rule of Naturalization . . . ; [t]o define and punish . . . Offences against the Law of Nations . . . ; [and] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and

Water . . . .

United States Constitution, Art. I, § 10

No State shall . . . enter into any Treaty, Alliance, or Confederation [or] grant letters of Marque or Reprisal . . . [or] without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [its] inspection Laws . . . . No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Art. II, § 2

The President shall be Commander in Chief . . . [and] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors . . . .

United States Constitution, Art. II, § 3

[The President] shall receive Ambassadors and other public Ministers . . . .

United States Constitution, Art. III, § 2

The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M

The full text of the Massachusetts Burma Law, Mass. Gen. Laws Ann. (M.G.L.A.) ch. 7, §§ 22G-22M (West 1999 Supp.), appears at Pet. App. 88-94. Excerpts from the same sections appear in the Statement of the Case, below.

STATEMENT OF THE CASE

1. Procedural History

Plaintiff NFTC filed its complaint on or about April 30, 1998. Jt. App. 12. The parties filed a stipulation of facts (Jt. App. 209), cross-motions for summary judgment, and uncontested affidavits. Pet. App. 13-14. No party argued that a material fact was in dispute.

On November 4, 1998, the district court entered a memorandum and order granting summary judgment for the NFTC. Pet. App. 13-14, 75. The district court found that the Massachusetts Burma Law was not preempted by federal law, stating that the NFTC had "failed to carry [its] burden" to show preemption and that the "evidence does not establish sufficient actual conflict for th[e] court to find implied preemption." *Id.* at

85-86 (citation omitted). Nevertheless, the district court held that the Burma Law "impermissibly infringes on the federal government's power to regulate foreign affairs." *Id.* at 77. Quoting *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968), the court stated that the Massachusetts Burma Law "has more than an indirect or incidental effect in foreign countries" and a "great potential for disruption or embarrassment." Pet. App. 81. The sole evidence of "disruption or embarrassment" cited by the district court was the withdrawal of three companies from Burma and protests against the law filed by the European Union, the Government of Japan, and the Association of South East Asian Nations. Pet. App. 81-82. The district court did not reach the claim by the NFTC under the Foreign Commerce Clause. *Id.* at 86. On November 17, 1998, the court entered final judgment.

Petitioners timely appealed to the court of appeals, which affirmed. The court of appeals first noted that the parties "agreed" that "human rights conditions" in Burma "are deplorable." Pet. App. 5. The court acknowledged that the "passage of the Massachusetts Burma Law has resulted in significant attention being brought to the Burmese government's human rights record." Pet. App. 73. "Indeed," the court said, "it may be that the Massachusetts law was a catalyst for federal sanctions." *Id.* The court nevertheless held that (1) "the law interferes with the foreign affairs power of the federal government"; (2) the law represents regulation, not market participation, and violates the Foreign Commerce Clause; and (3) the law "violates the Supremacy Clause because it is preempted by federal sanctions against Burma." Pet. App. 5.

2. Facts

A. The Massachusetts Burma Law

The Massachusetts Burma Law was enacted in July, 1996, Mass. St. 1996, c. 130, and entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)." M.G.L.A. c. 7, §§ 22G-M. According to the United States Department of State, the "people of Burma continue to live under a highly authoritarian military regime that is widely condemned for its serious human rights abuses." 1st Cir App. (hereafter "R.") 336. In the months following enactment of the Massachusetts Burma Law in 1996, the United States, the European Union, Japan, and other countries imposed economic sanctions on Burma. Jt. App. 74-75, 78-81; R. 338, 342-48. *See also United States Department of State, Burma Country Report on Human Rights Practices for 1998* (February 26, 1999).

The Burma Law limits the procurement of goods and services by Massachusetts state agencies from persons who do business with Burma. It does not prohibit private investment in Burma; it does not prohibit private trade in goods and services in Burma; it does not govern the distribution of private assets or estates; it does not restrict foreign travel. It expressly applies to all Massachusetts and other United States companies, as well as foreign companies, doing business in Burma and seeking procurement contracts from the Commonwealth of Massachusetts.

The Burma Law effectively requires state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do

business with Burma. M.G.L.A. ch. 7, § 22H(d). Subject to certain exceptions, the Burma Law provides that "a state agency, a state authority, the house of representatives or the state senate may not procure goods or services from any person listed on the restricted purchase list maintained by the secretary [of administration and finance], or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed." M.G.L.A. ch. 7, § 22H(a). By its terms, the statute imposes "preference requirements" (§ 22I) rather than an absolute prohibition on state contracting with companies doing business with Burma. Thus, exceptions are authorized when the procurement is "essential" and enforcement of the restriction would "eliminate the only bid or offer, or would result in inadequate competition[,]" § 22H(b)(1) and (2); when the State is purchasing certain kinds of medical supplies, § 22I; or when there is "no comparable low bid or offer" by a bidder who is not on the list. § 22H(d). A "comparable low bid or offer" is defined as "a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service." § 22G. In practice, the "comparable low bid or offer" provision is applied by adding 10 percent to offers made by persons determined to be doing business with Burma. Pet. App. 7-8.

Section 22J(a) provides that the "secretary shall establish and maintain a restricted purchase list . . . [which] shall contain the names of all persons currently doing business with Burma (Myanmar)." "Doing business with Burma" is defined by § 22G as: "(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned

subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary licensee or franchise[e] of such a person; (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement; (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar); (d) providing any goods or services to the government of Burma (Myanmar)." Under sections 22H(e) and 22I, persons with operations in Burma limited to the "reporting the news" or providing goods or services "for the provision of international telecommunications," or "providing only medical supplies" are exempt from the restrictions of the Act.

The Act directs the Secretary of Administration and Finance (the Secretary), "[i]n establishing the restricted purchase list," "to consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources." § 22J(b). "The Secretary shall also place the name of any person [on the list] who, in the statement [submitted to state agencies under section 22H], declared that he meets the criteria for being so listed." *Id.*

B. Federal Legislation Concerning Burma

Three months after Massachusetts enacted its Burma Law, Congress authorized federal sanctions against Burma. *See* Pet.

App. 10-12. The Omnibus Consolidated Appropriations Act of 1997 (the Federal Burma Law), Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 through 3009-167 (Section 570), approved September 30, 1996, imposed conditional sanctions on Burma "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government . . . ." § 570(a). The sanctions include an end to most bilateral assistance (§ 570 (a)(1)) and the opposition by the United States to most multilateral aid. *Id.* at § 570(a)(2).

Section 570 also authorizes and directs the President "to prohibit . . . United States persons from new investment in Burma, if [he] determines and certifies to Congress that, after the date of th[e] Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition." *Id.* at § 570(b). "New investment" is defined by the Act to include "the economical development of resources located in Burma" but does "not include the entry into, performance of, or financing of a contract to sell or purchase goods, services or technology." *Id.* at § 570(f)(2).

The Act further directs the President to "seek to develop, in coordination with members of the Association of Southeast Asian Nations (ASEAN) and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma." *Id.* at § 570(c).

Finally, the Act requires the President to submit reports every six months to certain Congressional committees on: "(1) progress toward democratization in Burma; (2) progress on improving the quality of life of the Burmese people . . .; and (3) progress made in developing the [multilateral] strategy referred to in subsection (c) ['to bring democracy to and improve human rights practices . . . in Burma']." *Id.* at § 570(d).

C. Federal Executive Action Concerning Burma

On October 3, 1996, the President issued a proclamation entitled "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That Are Impeding the Transition to Democracy in Burma or Who Benefit from Such Policies." Proclamation No. 6925 (Oct. 3, 1996), 61 Fed. Reg. 52,233, 1996 U.S.C.A.A.N. at A83. The President stated that the "current regime in Burma continues to detain a significant number of duly elected members of parliament, National League of Democracy activists, and other persons attempting to promote democratic change in Burma." *Id.* The President further stated that the "regime has failed to enter into serious dialogue with the democratic opposition and representatives of the country's ethnic minorities . . . and has failed to meet internationally recognized standards of human rights." *Id.*

Seven months later, the President issued an Executive Order implementing section 570. Exec. Ord. 13047, 62 Fed. Reg. 28,301 (1997). In the Order the President "determine[d] and certif[ied] that, for purposes of [Section 570(b)], the Government of Burma has committed large-scale repression of the democratic

opposition in Burma after September 30, 1996, and further determine[d] that the actions and policies of the Government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and declare[d] a national emergency to deal with that threat." *Id.* Accordingly, the President "prohibit[ed] new investment in Burma by United States persons . . . ," subject to certain exceptions. *Id.*; *see also* R. 338 (Department of State summary of earlier unilateral United States sanctions, including "suspending economic aid, withdrawing GSP [General System of Preferences] . . . , implementing an arms embargo, blocking assistance from international financial institutions, downgrading our representation [from ambassador to charge d'affaires], and imposing visa restrictions on senior regime leaders and their families").

SUMMARY OF ARGUMENT

Introduction. For more than two hundred years, citizens of Massachusetts and other States have used boycotts to support the "natural, essential, and unalienable rights" of people around the world. *See* Mass. Const. of 1780, Pt. 1, art. 1 (West 1997 ed.). The Massachusetts Burma Law closely resembles private boycotts and the scores of divestment and selective purchasing laws enacted by state and local governments in the 1980s concerning South Africa. The Massachusetts law is also similar to many recent state and local laws and resolutions concerning Northern Ireland, Cuba, and Switzerland -- laws and resolutions now at risk in light of the broad ruling of the court below.

Nothing in our federal Constitution denies to the States the

right to apply a moral standard to their spending decisions. Not one constitutional grant, prohibition, or command requires the States to trade with dictators. In an era of global procurement and trade, state spending decisions will inevitably rile foreign countries and even risk embarrassment to the United States. These commonplaces, however, do not support constitutional judgments against selective purchasing laws. State laws that threaten national interests may be addressed by Congress, "whose voice, in th[e] area [of foreign affairs], is the Nation's." *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 331 (1994). Absent clear and valid preemption of state law by Congress, the States should be -- and are -- free to choose their own vendors and indirectly seek to "secure the blessings of liberty" around the world. U.S. Const., Preamble.

I. The Federal Burma Law does not preempt -- but rather implicitly permits -- state and local selective purchasing laws regarding Burma. The Court should presume that the state law is valid, notwithstanding the foreign subject of the federal law. The presumption of validity is supported by the cases of this Court, the historical importance of the state spending power, and the close similarity between the state law and indisputably valid private boycotts. [Pp.15-17]

Whatever presumption applies, there is no basis for a finding of preemption. Recent actions and inaction by Congress show that the Federal Burma Law does not impliedly preempt state and local selective purchasing laws concerning Burma. Congress was aware of state and local Burma laws in 1996 but took no action to preempt them. The absence of a preemption clause is especially telling here in light of the scores of similar laws enacted in the 1980s and Congress's failure to preempt them. The same federal

legislative history shows that Congress has impliedly *permitted* state and local laws regarding Burma. While the court below noted that "it may be that the Massachusetts law was a catalyst for federal sanctions," it failed to appreciate the significance of its statement: the strongest evidence of implicit permission present here and absent in *Barclays* is the fact that Congress later enacted a law on the same subject but did not expressly preempt state law. [Pp. 17-21]

Even if Congress has not implicitly permitted the state law, there is no actual conflict between the state and federal laws that would support a finding of preemption. The state law is consistent with the federal purpose: to promote human rights in Burma. The federal law does not create a scheme so comprehensive as to infer conflict from the mere differences between state and federal law. Nor do these differences alter a "balance" struck by Congress or frustrate the purpose of the later-enacted federal law. [Pp. 21-24]

II. Whether or not Congress has implicitly permitted the Burma Law, it is constitutional because the law represents market participation, not regulation, and therefore is not subject to claims under the dormant foreign commerce or foreign affairs powers. The constitutional basis for the market participation exception applies equally to these powers. The express limits on state action affecting foreign affairs imposed by Article I, § 10, read in light of the Tenth Amendment, further show that the Framers did not intend to impose unstated limitations on proprietary powers that might have foreign effects. [Pp. 25-29]

Selective purchasing laws such as the Burma Law represent market participation, not regulation. The laws represent the right to boycott exercised by private persons -- including NFTC

members -- long before and after the adoption of the federal Constitution in 1787. The important differences between the federal and state Burma laws further show that the state law is proprietary and the federal law regulatory. Whatever its aspirations for change abroad, the state law seeks to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma. This valid local purpose further shows that the procurement law at issue is market participation, not regulation. [Pp. 29-36]

III. The court of appeals held that the Massachusetts law "interferes with the foreign affairs power of the federal government." The Court need not reach this question: it may decide that selective purchasing is market participation and therefore not subject to a claim under the dormant foreign affairs power. Alternatively, the Court may decide that the *Barclays* test for implicit Congressional permission for action challenged under the Foreign Commerce Clause applies equally to a claim under the dormant foreign affairs power and that Congress has implicitly permitted state and local selective purchasing laws. [Pp. 36-38]

If the Court reaches the merits of the claim under the foreign affairs power it should reject it. The structure and terms of the Constitution require the Court to read *Zschernig v. Miller*, 389 U.S. 429 (1968), narrowly to permit the indirect effects of selective purchasing laws. In any event, the state law satisfies even *Zschernig* because its effects are indirect, not direct; remote, not immediate; and contingent, not inevitable. Whatever the aspirations of a selective purchasing law, its center of gravity lies at home, not abroad, and its effects are distinguishable from the direct effects of the regulation of foreign inheritances. The

complaints of foreign countries under a *trade* agreement do not change this result. Given the rise of global trade, judicial reliance on such complaints grants foreign countries a "heckler's veto" and will embroil the courts in case-by-case review of state laws touching foreign affairs. [Pp. 38-46]

IV. If the Court reaches the merits of the issue, it should hold that the Burma Law does not violate the Foreign Commerce Clause. The Burma Law applies equally to all foreign and domestic companies that seek to sell goods and services to state agencies. While the law might cause some state business to shift from one international supplier to another, that effect does not violate the Clause. The law should also be upheld because it has a legitimate local purpose: to disassociate Massachusetts from the human rights violations in Burma. The statement in support of freedom made by the law does not interfere with the ability of the United States to "speak with one voice" on foreign affairs because it does not affect the *capacity* of Congress to establish uniformity if the national interest so requires. The court of appeals erred in making its own evaluation of the national interest here. [Pp. 46-50]

ARGUMENT

I. THE FEDERAL BURMA LAW DOES NOT PREEMPT -- BUT RATHER IMPLICITLY PERMITS -- STATE AND LOCAL SELECTIVE PURCHASING LAWS REGARDING BURMA.

A. The Court Should Presume That Selective Purchasing Laws Are Not Preempted and Construe the Federal Burma Law to Preserve the Historic State Power of Procurement.

The court of appeals conceded that the Federal Burma Law was enacted after the Massachusetts law yet contains no express preemption clause. Pet. App. 64. However, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), the court below ruled that when "Congress legislates in an area of foreign relations, there is a *strong presumption* that it intended to preempt the *field*, in particular where the federal legislation does not touch on a traditional area of state concern." Pet. App. 69-70 (emphasis added). The court thus inverted the settled presumption against preemption and placed on the States the burden of proving that Congress did *not* intend to preempt selective purchasing laws.

Contrary to the ruling below, the presumption against preemption applies equally to federal laws that concern foreign affairs. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."); *United States v. Pink*, 315 U.S. 203, 230 (1942)("[E]ven treaties . . . will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this Nation unless clearly necessary to effectuate the national policy."); *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 6 (1986) (claim of "occupation of the field" of "international aviation" reviewed

under usual preemption principles, notwithstanding "extensive[]" federal regulation); *cf. Barclays*, 512 U.S. at 326 (state need only show "implicit permission" of Congress to sustain state law touching foreign affairs in challenge under Foreign Commerce Clause).

Nothing in *Hines* inverts the usual presumption supporting state laws. *Hines* struck down state action that clashed with a "complete scheme of regulation" enacted by Congress for alien registration. *See* 312 U.S. at 66. At most, *Hines* and similar cases suggest that a lower degree of conflict might *overcome* the presumption of validity, particularly where the federal policy affecting foreign affairs does not also affect "a field which the States have traditionally occupied." *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-8 (1988). None of these cases, however, weakens the presumption against preemption and in favor of the historic state power over spending.

"Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Alden v. Maine*, 119 S.Ct. 2240, 2264 (1999). The allocation of state resources includes the choice of vendors of goods or services. In making this choice -- in deciding with whom the State will deal -- the State acts as "guardian and trustee" for its citizens. *Reeves v. Stake*, 447 U.S. 429, 438 (1980). The foreign resonances of these choices do not change their local character. *See* Arg. II.B, below; *Heim v. McCall*, 239 U.S. 175, 191-94 (1915) (state contracting law not inconsistent with treaty; "conditions" for "public work" a "special power of the State"). Selective purchasing laws are in their essence local measures resembling private boycotts, and the Court should not presume that Congress intended to impose greater

limits on state and local governments than on private persons. *Cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (First Amendment protects private boycotts); *New York v. United States*, 505 U.S. 144, 177-78 (1992) (generally applicable federal laws do not present same issues of federalism as laws that single out the States). For these reasons, the Court should presume that the Burma Law is valid and construe the Federal Burma Law to avoid preemption.

B. Congress Has Consistently Failed to Occupy the Field Long Held by State and Local Selective Purchasing Laws.

Whatever presumption the Court applies, the relevant actions and inaction of Congress show that the Federal Burma Law does not impliedly preempt state and local selective purchasing laws concerning Burma. Congress was aware of the state and local Burma laws in 1996 but took no action to preempt them. *See Beal v. Doe*, 432 U.S. 438, 447 (1977) (Congress presumed to be aware of state laws on similar subject). The absence of a preemption clause is especially telling here in light of the scores of similar laws enacted in the 1980s and Congress's failure to preempt them. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l Law 821, 822 (1989) (twenty-three States and eighty cities enacted divestment or procurement laws regarding South Africa); *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 562 A.2d 720, 744-49 (1989) (local divestment ordinance not preempted by federal Comprehensive Anti-Apartheid Act (CAAA) of 1986), *cert. denied*, 493 U.S. 1093 (1990); 10 Op. Off. Legal Counsel

65, 86-90, 1986 WL 213238 (state and local divestment and selective purchasing laws not preempted by federal action prior to CAAA); H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986) (denying preemptive intent of CAAA); 132 Cong. Rec. H6757-67 (September 12, 1986) (House debate on same); 132 Cong. Rec. S12533 (Sept. 15, 1986) (Sen. Kennedy, quoting testimony of Laurence H. Tribe); *see also* Brief for Members of Congress, *Amici Curiae*, Supporting Petitioners (citing subsequent federal laws concerning South Africa). More recently, Congress has debated the wisdom of state and local purchasing laws (*see id.*) and introduced sanctions reform legislation, but has not proposed federal laws that would expressly preempt state and local measures.[1] In contrast, when Congress has wished to preempt state action that might affect foreign affairs, it has done so expressly. *See* Export Administration Act of 1979, 50 U.S.C. app. § 2407(c) (West 1991) (Anti-Arab boycott provisions "preempt any law, rule or regulation" specified).

This history of congressional action and inaction shows that Congress in 1996 did not deny to state and local governments a freedom of choice that they and private citizens have long

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[1] Thus, in 1997, the federal bill intended to limit federal trade sanctions did not apply to state and local legislation, even though its sponsor noted that "roughly twenty States and localities have adopted laws prohibiting government commercial dealings with United States or foreign companies that do business with countries that have poor human rights records" and "some of [these] . . . sanctions raise difficult questions concerning the constitutional authority to conduct U.S. trade and foreign policy." H.R. 2708, 105th Cong., 2d Sess. (1997); 143 Cong. Rec. E2080 (October 23, 1997)(Rep. Hamilton).

enjoyed. Rather, the legislative history shows that while several Congresses have been well aware of state and local selective purchasing laws, they have not viewed them as inconsistent with federal or multilateral efforts to promote human rights around the world.

C. Congress Has Implicitly Permitted Selective Purchasing Laws Regarding Burma.

The federal legislative history set forth above not only shows the absence of express or implied preemption, but also demonstrates "implicit" Congressional "permission" for selective purchasing laws, under the reasoning of *Barclays*, 512 U.S. at 326.

In *Barclays*, the Court upheld the California "worldwide unitary" method of taxing multinational corporations, relying on Congress's "implicit permission" for that method. *Id.* at 324, 326, 329. The Court noted that the Constitution allocates to Congress the power to establish uniformity -- to "speak with one voice" in matters affecting foreign nations -- when it wishes to do so. *Id.* at 329. Where, however, Congress had failed to nullify the state tax at issue, despite attacks by the Executive Branch, *id.* at 328-29, and a "battalion" of foreign countries, *id.* at 320, 324 n.22, the Court determined that Congress had implicitly permitted the law and thus protected it from a claim that it interfered with the conduct of foreign relations.

In this case, Congressional action and inaction in 1986, 1996, and 1997 -- regarding South Africa, Burma, and federal sanctions generally -- show implicit permission for selective

purchasing laws regarding Burma. *See also* Brief for Non-Profit Organizations, *Amici Curiae* (international human rights conventions ratified by Senate reserve enforcement of human rights to the States). In addition to this legislative history, the federal act implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) shows further evidence of congressional intent to permit the States to enact laws that might otherwise raise constitutional issues. The federal act implementing GATT denies to private persons and foreign governments the right to maintain an action in federal or state court against a State law on the basis of GATT. *See* Uruguay Round Agreement Act of 1994 (URRA), P.L. 103-465, § 102(c)(1), 108 Stat. 4809, 4818, 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1). Only the United States may file such an action, and it has not. *Id.* Furthermore, in approving the "Statement of Administrative Action" (SAA) proposed by the President for implementation of the URRA (*see* 19 U.S.C. §§ 3511(a) and 3512(d)), Congress stated that the denial of all private rights of action extends to those that "seek, directly or indirectly, the private enforcement of [GATT]," including suits "based on Congress' Commerce Clause authority." SAA, *reprinted at* 1994 U.S.C.A.A.N. at 4055. By foreclosing such suits against state procurement laws, Congress has given implicit permission for the Burma Law.

Despite Congressional action and inaction in 1986, 1994, 1996, and 1997, the court below found that the evidence of Congressional permission in this case is weaker than the evidence in *Barclays*. Pet. App. 60-63. While the court noted that "it may be that the Massachusetts law was a catalyst for federal sanctions" (Pet. App. 73), it failed to appreciate the significance of its

statement: the strongest evidence of implicit permission present here and absent in *Barclays* is the fact that Congress *later enacted a law on the same subject but did not expressly preempt state law.* This Court should credit this evidence and hold that Congress has implicitly permitted state and local selective purchasing laws on Burma.

D. The Differences between State Selective Purchasing Laws and the Federal Ban on Private Investment Do Not Establish Actual Conflict with the Federal Law or Frustrate Its Purpose: to Promote Human Rights in Burma.

Even if Congress has not implicitly permitted selective purchasing laws regarding Burma, the court of appeals erred in holding that there is an actual conflict between the state and federal laws. The federal sanctions are intended by Congress "to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma." P.L. 104-208, § 570(c). Federal officials have acknowledged that related state and private actions share the same goal. *See* Jt. App. 199 (State Department official describes "shared goal" of federal and state action); R. 419 (Secretary of State opines that "it is only right that Burma is subject to international sanctions *and consumer boycotts*")(emphasis added). Even the broadest purpose ascribed to the Massachusetts law -- to promote human rights in Burma -- is consistent with these goals. Where the state law furthers the

purpose of the federal law, the Court should not find conflict. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 82-83 (1987).

Nor is there any actual conflict between the state and federal laws. United States companies may physically comply with both. Foreign companies are not subject to the federal law. The state law does not authorize the new investment prohibited by the federal law or prohibit trade in goods and services permitted by the federal law.

The court of appeals nevertheless held that (1) "Congress has constructed a reasonably comprehensive statute covering a field of foreign relations," and (2) the state law "conflict[s]" with federal law because it "veers from the carefully balanced path that Congress has constructed" and therefore "threatens to upset that balance . . . ." Pet. App. 70, 73.

First, the court of appeals exaggerated the fact and significance of the "comprehensiveness" of the federal law. Even an "intricate and complex response[] from the Congress" does not necessarily show that Congress intends to exclude state and local action. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). Rather, the Court "must look for special features warranting preemption." *Id.* Although the Federal Burma Law is in some respects "comprehensive" (*e.g.*, prohibiting all future *private* "development of resources" in Burma), it is not "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613 (1991); *id.* ("comprehensive regulatory statute" had "ample room" for State "to supplement federal efforts"); *Board of Trustees*, 562 A. 2d at 740-44 *(Comprehensive* Anti-Apartheid

Act does not preempt divestment law) (emphasis added); H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986) (same). At most, the federal statute creates a comprehensive scheme to coordinate Burma policy among the branches and agencies of the federal government.

Second, the Court should reject the court of appeal's view that the state law "conflict[s]" with federal law because it "veers from the carefully balanced path that Congress has constructed" and therefore "threatens to upset that balance . . . ." Pet. App. 73. The court deemed the federal approach "multilateral" and said that the state law departed from that path. *Id.* at 71. As the District Court noted, however, the federal sanctions are unilateral. *See* Pet. App. 86; 142 Cong. Rec. S8752-53 (July 25, 1996) (State Department testifies that United States "maintain[ed] a range of unilateral sanctions and d[id] not promote U.S. commercial investment ties with Burma"); R. 338 and n.1 (same).[2] Thus, the federal policy toward Burma is not *exclusively* multilateral: the United States has chosen to use both unilateral and multilateral tools to achieve reform in Burma.

Nor do the alleged differences between the state and federal approaches show preemption. *See* Pet. App. 70-71. State laws

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[2] The NFTC has said that the federal law on Burma "does not make the new investment ban contingent on multilateral agreement." Jt. App. 61. NFTC's affiliate, USA-Engage, has noted the unilateral nature of recent United States foreign policy, stating that "[i]n just four years the United States has imposed 61 unilateral economic sanctions on 35 countries . . . ." R. 366; *see also* R. 356, 358-361 (describing specific United States policies toward countries including Burma as "unilateral sanctions").

are generally not preempted "solely because they impose liability over and above that authorized by federal law." *English v. General Electric Co.*, 496 U.S. 72, 89 (1990). Even differences with "adverse impact" on "national policy" may not establish actual conflict, particularly where there is evidence of Congressional permission. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-34 (1981). The purported "balance" struck by Congress in this case has not been disturbed because their is no evidence that the state law has thwarted the federal sanctions or hindered human rights in Burma. Absent such proof, there is no basis whatsoever to conclude that the federal purpose has been so frustrated to create "conflict" and warrant preemption.

Instead of identifying actual conflict, the court below conducted "[a] free wheeling judicial inquiry into whether [the] state statute is in tension with federal objectives [and] undercut the principle that it is Congress rather than the courts that preempts state law." *Gade v. National Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring). The court of appeals found preemption on the mere facts that Congress has imposed sanctions on Burma and the earlier state law differs from the federal law. These facts do not support preemption in this case.

II. THE BURMA LAW IS CONSTITUTIONAL BECAUSE IT REPRESENTS MARKET PARTICIPATION, NOT REGULATION, AND THE LAW THEREFORE IS NOT SUBJECT TO CLAIMS UNDER THE DORMANT FOREIGN COMMERCE AND FOREIGN AFFAIRS POWERS.

A. The Market Participation Doctrine Applies to Claims under Both the Dormant Foreign Commerce and Foreign Affairs Powers.

Whether or not Congress has implicitly permitted the Burma Law, it is constitutional because it represents market participation, not regulation, and is therefore not subject to claims under the dormant foreign commerce and foreign affairs powers.

The Court has primarily applied the market participant exception to claims under the domestic Commerce Clause. *See, e.g., White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 214-15 (1983) (rejecting Commerce Clause challenge to City of Boston requirement that at least 50% of the private workforce on all construction projects funded wholly by the city must be Boston residents); *Reeves, Inc. v. Stake*, 447 U.S. at 436-37 (upholding state law prohibiting sale of state-produced cement to non-state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (upholding "bounties" paid by State for scrap cars where law favored state residents seeking bounties); *Camps Newfound/Owatonnav. Town of Harrison*, 520 U.S. 564, 593 (1997) (state tax exemption is not market

participation where there is no "direct state involvement in the market" through state "purchase" or "sale" of goods). The Court has reserved the question whether the exception applies to the Foreign Commerce Clause. *See Reeves*, 447 U.S. at 438 n.9. The court of appeals saw this question as one of policy, "weighing the risks inherent in state regulation of foreign commerce . . . ." Pet. App. 49-50. The Court should reject this approach and rule that the history and structure of the dormant foreign commerce and foreign affairs clauses do not nullify proprietary state action.

"The historical evidence no more suggests that the Commerce Clause was intended to limit the ability of states to purchase goods (including securities) and services in the marketplace when their operations indirectly affect foreign commerce than it indicates such an intent when their operations affect domestic commerce." 10 Op. Off. Legal Counsel at 72-73 (summarizing historical evidence). The primary purpose of the Foreign Commerce Clause -- itself a grant of *regulatory* power -- was to enable Congress to address problems created by state *regulation* of foreign commerce, particularly state tariffs. *Id.* There is nothing in the history of that clause that suggests that it was intended, *sub silentio*, to displace state proprietary activity. *See* Brief of North Dakota, *et al.*, *amici curiae*.

This conclusion is supported by the other constitutional bases for the market participation exception. The market participation doctrine rests on a "healthy regard for federalism and good government" and the constitutional "restraint . . . counseled by considerations of state sovereignty . . . ." *Reeves*, 447 U.S. at 437-38, 441. Indeed, in *Reeves*, the Court noted that it was no part of the "*constitutional plan* to limit the ability of states themselves to operate freely in the free market."

Id. at 437 (emphasis added). This statement assumes that at the time of the adoption of the Constitution, the States acted in both proprietary and regulatory roles. In 1903, the Court distinguished between these roles in dismissing a substantive due process claim against a state law requiring contractors hired by a state agency to limit their employees to an eight-hour day. *Atkins v. Kansas*, 191 U.S. 207, 222-23 (1903). The Court held that the law did not unconstitutionally infringe on the "liberty" of the contractor because the state, "as the guardian and trustee for its people," could "prescribe the conditions upon which it will permit public work to be done on its behalf . . . and [n]o court has authority to review" such action. *Id.*

Reeves also noted the "long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . . ." *Id.* at 438-439 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see also Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (government's "unrestricted power . . . to determine those with whom it will deal"). "[W]hen acting as proprietors, States should similarly share existing freedoms from federal constraints, *including* the inherent limits of the Commerce Clause." *Reeves*, 447 U.S. at 439 (emphasis added).

These broad constitutional bases for the market participation doctrine show that it applies to claims under the Foreign Commerce Clause. The "greater scrutiny" given by the Court to some state actions touching foreign affairs (*see id.* at 438 n.9) should be limited to state regulatory measures. In cases involving proprietary action and foreign affairs, a State's role as "guardian and trustee for its people" may actually be enhanced: no guardian

would lightly allow state tax dollars to support the denial of human rights by a foreign regime. While the rise of global commerce has brought the world to the States' doorsteps, the Constitution -- through the market participation exception -- allows the States to turn the more suspect peddlers away.

The market participation doctrine likewise applies to the claim that the Burma Law interferes with the ability of the federal government to conduct foreign affairs. As explained below in Argument III, *Zschernig v. Miller*, 389 U.S. 429 (1968), remains the "only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power of the federal government." Pet. App. 30. *Zschernig* applied the doctrine to an Oregon law that regulated the distribution of private estates to nonresident aliens. Nothing in the opinion of the Court addressed state proprietary activity.

The historical basis for the federal foreign affairs powers does not imply the displacement of state proprietary power. The Framers were primarily concerned with congressional control over the exercise of state *regulatory* power affecting foreign affairs -- particularly tariffs. *See The Federalist* No. 22, at 144 (C. Rossiter ed. 1961); *id.* No. 23 at 153. They also expressly denied to the States the right to undertake actions -- such as treaties or acts of war -- long associated with international sovereignty. Article I, § 10. These express limitations on state action in Article I are significant. "In view of the Tenth Amendment's reminder that the powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state

power were intended by the Framers." *Alden*, 119 S. Ct. at 2259 (quotation omitted). None of the actions expressly prohibited by Article I addresses proprietal action. In light of the historical basis of the foreign affairs and foreign commerce powers, the Court should apply the market participant doctrine to the claims under both powers in this case. *See* 10 Op. Off. of Legal Counsel at 84-86 ("We do not think the [*Zschernig*] principle should be extended to state proprietal action"); *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 742 F. Supp. 900, 903 (M.D. Pa.), *aff'd*, 916 F.2d 903, 909-13 (3d Cir. 1990) (applying market participation doctrine to foreign commerce [district and circuit courts] and foreign affairs [district court] claims against "Buy American" laws), *cert. denied*, 501 U.S. 1212 (1991).

B. Selective Purchasing Is Market Participation: It Represents the Right to Boycott Enjoyed by Private Persons for Two Centuries.

Selective purchasing laws such as the Burma Law represent market participation, not regulation. These laws represent the same right to boycott exercised by private persons long before and after the adoption of the federal Constitution in 1787.

Selective purchasing laws have a long pedigree. In the New England and other colonies, the founding generation considered the nonimportation boycott to be a wise alternative to war. *See* Charles McLean Andrews, *The Boston Merchants and the Non-Importation Movement* 17, 33-34, 40-41, 43, 55 (1968); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 Pa. L. Rev.

287, 330-35 (1990). More recently, the Court has reaffirmed its view that private boycotts have historical roots in rights protected by the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. at 907. Recent laws on South Africa, Burma, and Northern Ireland maintain these long private and public traditions. *See* Pet. App. 10; Jt. App. 144-56; *Board of Trustees*, 562 A.2d at 749-53 (divestment ordinance is market participation). Meanwhile, private companies have repeatedly conducted their own "selective purchasing." Voluntary "codes of corporate conduct" and corporate withdrawals from Burma -- many of which criticize the conduct of foreign governments or firms -- show that Massachusetts has acted as private actors can and do act. *See* Debora L. Spar, *The Spotlight and the Bottom Line -- How Multinationals Export Human Rights*, 77 Foreign Affairs (March/April 1998) at 7; United States Dep't of Labor, *The Apparel Industry Codes of Conduct: A Solution to the International Child Labor Problem?* (1996) at 8, 13 n.16 ("Clinton Administration [has] encouraged United States corporations and organizations to develop their own voluntary codes of conduct for their foreign operations"); 155, 157 (NFTC members have established codes of conduct and withdrawn from Burma, citing human rights concerns) (cited excerpts at R. 389, 391 n.16, 402-03, 411-12, 413-14); Jt. App. 225 ¶ 48 (NFTC stipulates that its members have "directly encouraged legal reforms in foreign countries" and have "asked foreign governments to change their laws and practices concerning child labor").

The important differences between the federal and state Burma laws further show that the state law is proprietary and the federal law regulatory. The Federal Burma Law bans new

investment by private persons. It does not govern federal procurement. Private companies are not free to avoid the federal ban on new investment: the federal law represents the exercise of the sovereign power uniquely enjoyed by government to compel private action under the threat of punishment.

In contrast, the Massachusetts law governs only the procurement of goods and services by the State -- and thus a market created solely by State purchasing. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219, 2230 (1999) (market participant exception applies where State is "buying and selling in the market"). It does not prohibit or compel private action: every domestic and foreign company is free to continue to do business with Burma. The limits on public purchases imposed by the law are therefore proprietary activity exempt from the constitutional claims in this case. *See* Laurence H. Tribe, *Constitutional Law* (1988 ed.) § 6-22, p. 469 (a state "opposed" to foreign regime may not -- absent congressional authorization -- bar businesses from its jurisdiction or ban trade by its citizens, but may adopt selective purchasing laws).

Despite the obvious differences between the state and federal laws, the court below deemed the state law an attempt to regulate because it "pursue[s] goals that are not designed to favor its citizens or to secure local benefits." Pet. App. 46. This ruling ignores an important purpose of the state law. While *one* purpose of the Burma Law is indirectly to encourage change in Burma, that is not its only purpose. The law is also intended to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma. *See* Jt. App. 51 (remarks of Sen. Walsh) (prior to enactment of selective

purchasing law on South Africa, Massachusetts had become a "party and unwitting conspirator" to human rights violations); 52 (prior to enactment of Northern Ireland law, Massachusetts had "subsidiz[ed] bad practices through [its] contracts"); *see also* Jt. App. 197 (Secretary of State opines that "state and local officials" have "right" and "responsibility" to apply "moral considerations" to their "procurement policies"). There is no question on this record that the Massachusetts Legislature would have enacted the Burma Law even if it believed that it could not effect change in Burma. Even if the Court believes that State or local governments may not constitutionally *encourage change* in foreign countries, selective purchasing laws must be upheld against a facial attack because they are a valid exercise of the right to disassociate from a repugnant regime. In light of this valid local purpose, the Court should deem the Burma Law market participation immune from this facial attack. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) ("Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"; "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"); *see also South-Central Timber v. Wunnicke*, 467 U.S. 82, 101-103 (1984) (Rehnquist, J., dissenting) (conditions on state sale of timber are market participation where state could accomplish same end by indisputably valid means).

The state need not show an economic benefit to itself or its citizens in order to establish that a selective purchasing law is proprietary activity. A private boycott on purely altruistic grounds is no less private, and possibly more worthy of protection under the First Amendment, than a profit-motivated boycott.

Similarly, the Court has held state action to be proprietary even where the stated or obvious purpose of the state law -- or its effect -- was to influence private conduct and thus achieve goals unrelated to local economic self-interest. *See Hughes*, 426 U.S. at 814 (environmental concerns). Thus, in *Hughes and Reeves*, "[the States] did not enter a presumably unmanipulable market with the profit-maximizing goals implied in the phrase 'market participation.' Instead, the States intended their entrances to affect the flow of commerce so as to enhance *public* values -- improvement of the environment or increased supply of a needed product at the expense of the state as a business." Laurence H. Tribe, *Constitutional Choices* (1985) at 144-46 (emphasis in original). Market participation may promote public values broader than local economic benefits because the doctrine rests on principles of federalism as well as an analogy to private conduct. *See Reeves*, 447 U.S. at 438.

Nothing in *Wunnicke* suggests that the Burma Law is a regulatory measure. In *Wunnicke*, a plurality of the Court held that the market participant doctrine did not protect a discriminatory restriction imposed by Alaska, which required purchasers of state-owned timber to process the logs within the State. The plurality reasoned that this additional *restriction* on private activity reached beyond the immediate market in which the State was participating -- the sale of its timber -- and that for purposes of applying the market participant doctrine, the "market" must be "relatively narrowly defined." 467 U.S. at 97-98. However, the plurality also emphasized that the State was attempting to impose an additional *downstream restriction*, going beyond what sellers, who in the ordinary course of commercial endeavor have no continuing interest in the product once it is

sold, traditionally do. *Id.* at 98-99.

In contrast, the Massachusetts state government is the ultimate purchaser of all goods and services covered by the Burma Law, and purchasers traditionally do "decide with whom they will deal," even if that decision indirectly affects secondary *upstream* markets. Indeed, given that *White* accepted an upstream restriction on whom private contractors can hire (460 U.S. at 208), a selective purchasing law could not possibly be invalid simply because it might affect secondary upstream markets. Like the Baltimore divestment ordinance and the "Buy American" laws, the Burma Law places no "restriction on private economic activity [which] takes place after the completion of the parties' direct commercial obligation." *Board of Trustees*, 562 A.2d at 752 (quoting *South Central Timber*, 467 U.S. at 99). Like the restriction in *White*, the Burma Law imposes a narrow condition precedent on companies who are competing for state contracts and thus "cover[s] a discrete, identifiable class of economic activity in which the State is a major participant." 460 U.S. at 211 n.7. Its terms do not "reach beyond the immediate parties" to state procurement, and its indirect effects, if any, do not "figure[]" in "equation" used to judge whether the law is regulation or market participation. *Id.* at 210.

Nor do the cases decided under the National Labor Relations Act (NLRA), 29 U.S.C. § 51 *et seq.*, cited by the court below, restrict the scope of the market participation exception here. Each of the cases concerned the scope of the preemption of the NLRA, not the scope of the Constitution. "The market participant doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power *in areas where Congress has acted.*" *Wisconsin*

Dep't of Industry v. Gould, 475 U.S. 282, 289 (1982)(emphasis added). Emphasizing that "what the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what the States may do with the Act in place," the Court held that in enacting the NLRA, Congress intended to prohibit the States from interfering in any way with the "interrelated federal scheme of law, remedy, and administration." *Id.* (citations omitted). Eleven years later, the Court distinguished *Gould*, noting that a "State does not regulate . . . simply by acting within [a federally] protected area[]." *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993).

The court below relied on a single sentence in *Gould*, which stated that "for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289; *see* Pet. App. 47. But this sentence merely shows that the Court viewed the Wisconsin statute as a "regulation" because it specifically linked the State's decisions to violations of the broad regulatory scheme erected by the NLRA, and punished companies for past violations of the federal regulatory law. The Court viewed the law as "an attempt to compel conformity with the NLRA." *Building & Constr. Trades Council*, 507 U.S. at 228. The Massachusetts law, in contrast, does not depend for its operation on reference to a federal regulatory scheme. Unlike the Wisconsin scheme, the Burma Law does not disqualify companies from eligibility for state contracts on the basis of past actions, but rather makes their continuing, unrestricted eligibility for contracts subject to certain conditions with which they can prospectively comply. Thus, the Burma Law does not operate like the statute in *Gould*, but rather like the condition on the

procurement of construction services in *White*. *See Gould*, 475 U.S. at 289 (reaffirming *White*); 10 Op. Off. of Legal Counsel at 77-79 (distinguishing *Gould*);

For these reasons, the Court should hold that the Burma Law is not subject to review under the foreign commerce or foreign affairs powers.

III. SELECTIVE PURCHASING LAWS DO NOT INTERFERE WITH THE CAPACITY OF THE UNITED STATES TO CONDUCT FOREIGN RELATIONS.

A. The Court Need Not Reach the Foreign Affairs Power Claim If It Holds That the Burma Law Is Market Participation or Implicitly Permitted by Congress.

The court of appeals held that the Massachusetts law "interferes with the foreign affairs power of the federal government." Pet. App. 5, 14-41. Citing *Zschernig v. Miller*, the court said that the "Massachusetts law presents a threat of embarrassment to the country's conduct of foreign relations regarding Burma" and therefore "has more than an "incidental effect" on foreign affairs. Pet. App. 27.

The Court need not reach this question: it may decide that selective purchasing is market participation and therefore not subject to a claim under the dormant foreign affairs power. Alternatively, the Court may decide that Congress has implicitly permitted state and local selective purchasing laws and *Barclays'* standard of implicit Congressional permission for action

challenged under the Foreign Commerce Clause applies equally to a claim under the dormant foreign affairs power. Under *Barclays*, express Congressional *approval* of a state law affecting foreign affairs is not required for the Court to hold a state law constitutional: while the federal government must have the "*capacity*" to "speak with one voice" on foreign affairs when the national interest so requires, "Congress may more passively indicate that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential;' . . . it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminated against interstate commerce . . . ." *Id.* at 323 (emphasis in original). This more deferential rule for state laws affecting *foreign* policy reflects the fact that the "nuances" of the "foreign policy of the United States are much more the province of the Executive Branch and Congress than of th[e] Court . . . ," *Barclays*, 512 U.S. at 327, and the "judiciary is not "vested with power to decide how to balance" the effects of a state law on foreign relations. *Id.* at 328. Under this principle of judicial restraint in the area of foreign affairs, the Court "leave[s] it to Congress -- whose voice, in this area, is the Nation's -- to evaluate whether the national interest is best served by uniformity, or state autonomy." *Id.* at 331.

This deferential standard should apply to claims under *Zschernig* as well. Claims under *Zschernig* -- like the claims under *Barclays* -- essentially allege that state or local action unconstitutionally interferes with the conduct of foreign policy. Regarding both dormant powers, Congress may authorize implicitly what the negative force of the grant of federal power might otherwise forbid. Accordingly, if the Court holds that

Congress has implicitly permitted the Burma Law, it should reject both the dormant foreign commerce and foreign affairs power claims. If, on the other hand, the Court reaches these claims, it should hold that selective purchasing laws such as the Massachusetts Burma Law do not interfere with capacity of the United States to conduct foreign relations.

B. The Structure and Terms of the Constitution Require the Court to Read *Zschernig* Narrowly to Permit the Indirect Effects of Selective Purchasing Laws.

Zschernig remains "a unique statement and a sole application of constitutional doctrine." Pet. App. 30 (quoting Louis Henkin, *Foreign Affairs and the Constitution* (1996 ed.) at 165); *see id.* at 162 ("until 1968, there was no hint of such a principle"), 165 n.; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1641-64 (1997).

Zschernig did not concern selective purchasing or divestment. In *Zschernig*, the Oregon statute at issue regulated the terms under which a nonresident alien could inherit property from an Oregon decedent. The state law prohibited inheritance by a nonresident alien unless three conditions were satisfied: (1) the alien's government must accord Americans the right to inherit on equal terms with its citizens; (2) the alien's government must give Americans the right to receive payment in the United States of funds from foreign estates; and (3) the nonresident alien must be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government. The

Court concluded that this type of probate law *as enforced in the Oregon courts* had "a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court stressed that the extensive record of enforcement of the statute by the Oregon courts showed a "*great potential for disruption or embarrassment*" in the conduct of foreign relations: the Oregon courts had repeatedly criticized the administration of foreign laws by foreign officials, questioned their credibility, and denied foreign citizens private inheritances based on "foreign policy attitudes" toward particular governments. *See* 429 U.S. at 435 (emphasis added).

Zschernig did not overrule *Clark v. Allen*, 331 U.S. 503 (1947), which upheld the facial validity of a California statute similar to the first two sections of the Oregon law. Although the California statute in *Clark* was clearly designed to influence foreign countries to change their laws to allow Americans to inherit, the Court dismissed the constitutional claim against the law as "farfetched." *Id.* at 517. Emphasizing that "rights of succession" were peculiarly a matter of local law, the Court agreed that "[w]hat California has done will have some incidental *or indirect* effect in foreign countries" but concluded "that is true of many state laws which none would claim cross the forbidden line." *Id.* (emphasis added). Neither *Zschernig* nor *Clark* addressed the exercise of public spending powers -- only the regulation of private inheritances by foreign citizens.[3]

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[3] The lower court cases cited by the court of appeals similarly concern the regulation of private activity, not public spending. *See* Pet. App. 27-29.

The court below stated that the "precise boundaries" of *Zschernig* "are not clear[,]" and "subsequent Supreme Court holdings have done little to clarify the reach of the Court's holding . . . ." Pet. App. 20, 30. The court below conceded that "some degree of state involvement in foreign affairs is inevitable" and that "[i]n the governance of their affairs, states have variously and inevitably impinged on United States foreign relations." Pet. App. 18 (*quoting* Henkin, *supra*, at 162). This trend is now a truism: increased foreign trade and global communication and transportation have married the States to foreign firms and countries, for better or worse, leaving "the line between national and state and local concerns . . . much less clear than when the Republic was founded." Bilder, 83 Am. J. Int'l Law at 828.[4]

The court below asked whether the Massachusetts law fell within "the boundaries of permissible state activity in the foreign affairs context." Pet. App. 18. In striking down the law, however, the court below moved the boundaries of *Zschernig* so as to threaten state and local divestment laws, resolutions, and

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[4] The Commonwealth of Massachusetts maintains twenty-three "sister-state" and other bilateral agreements with sub-national foreign governments and trade promotion organizations. Pet. App. 18; Jt. App. 204, ¶ 4. Many other States have similar programs. Henkin, supra, at 426-27 n.26; Brenda S. Beerman, State Involvement in the Promotion of Export Trade, 21 N.C. J. Int'l. L. & Com. Reg. 187, 202 -220 (1995). The Commonwealth routinely helps companies "increase their business in international markets" by maintaining overseas trade offices and introducing companies to officials of foreign governments. Jt. App. 203, ¶ 1. These companies include two members of the Board of Directors of the NFTC. *Id.* at 204, ¶ 3; R. 99.

many other laws related to foreign affairs.

The structure and terms of the Constitution show why *Zschernig* must be cabined to its facts. The Constitution does not use the terms "foreign relations," "foreign policy," or "foreign affairs." Instead, it grants certain powers to the federal government and denies certain powers to the States, reserving to the States in the Tenth Amendment the powers not granted or denied. Article II, § 2, makes the President Commander in Chief of the armed forces of the United States and authorizes him to enter into treaties and to appoint and receive ambassadors. Congress is given authority to regulate foreign commerce, raise and support armies, define offenses against the law of nations, and to declare war. Art. I, § 8. The powers granted to the federal government under Articles I and II, when exercised, are made plenary through the Supremacy Clause, Art. VI, § 2.

Other parts of the Constitution affirmatively show that the Framers expected that state action would sometimes affect foreign affairs. U.S. Const. Art. I, § 10 (authorizing agreements between States and foreign countries and certain military actions with consent of Congress); Art. III, § 2 (jurisdiction to hear cases between States and foreign parties). Instead of a blanket prohibition on such contact, the Framers denied to the States specific powers, *e.g.*, to engage in war, enter treaties, and levy duties on imports or exports. Art. I, § 10, cls. 1-3. The Framers likely prohibited these actions because they had been restricted by the Articles of Confederation, long associated with international sovereignty, and posed unacceptable risks to the effective conduct of foreign affairs. *See* Goldsmith, 83 Va. L. Rev. at 1643-44 & n.121. None of the state actions prohibited by Art. I concerns a proprietary power such as the purchase of goods and services or

the management of state investments. Rather, these proprietary powers are "reserved to the States, or the people" by the Tenth Amendment.

"The most natural inference from these provisions and from the Constitution's enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty." *Id.* at 1642. While the Court in *Zschernig* apparently did not draw the same inference, the structure and terms of the Constitution show that *Zschernig* must be read with "caution," to invalidate only state actions that reflect acts of international sovereignty and create the same degree of risk to national security as the actions prohibited by Article I. *See Alden*, 119 S.Ct. at 2259.

In this case, nothing in the Burma Law enters a treaty, engages in war, levies duties on imports or exports, or conducts direct relations with Burma. Like the statute in *Clark* and unlike the statute in *Zschernig*, the implementation of the Burma Law does not require repeated decisions by state officials about the operation of Burmese law or the credibility of Burmese officials. Jt. App. 217 (Stipulation ¶ 21). The general statements critical of Burma made by Massachusetts supporters of the Burma Law do not render the law unconstitutional because *Zschernig* does not foreclose all "actions involving substantive judgments about foreign nations"; rather, "a single general decision" about a nation is "beyond the scope of *Zschernig*." *Board of Trustees*, 562 A.2d at 745-46. In short, the procurement of goods by state or local government -- by its nature -- is not an act of international sovereignty that poses an unacceptable risk to the security of the United States. *Cf. United Building & Constr. Trades v. Mayor*

and Council of City of *Camden*, 465 U.S. 208, 221 (1984)(city's expenditure of "its own funds" may be "crucial factor" in defeating claim under Privileges and Immunities Clause).

The Massachusetts law further satisfies *Zschernig* because its effects are indirect, not direct; remote, not immediate; and contingent, not inevitable. While some companies have withdrawn from Burma, citing the Massachusetts law, other companies have left because of the denial of human rights there. R. 362, 367. As for the NFTC's own view of the effects of the law, it has elsewhere argued that "unilateral" governmental action has had "no success" in any country and "only make[s] a statement without any impact." Jt. App. 86. To be sure, selective purchasing laws are enacted in part in the hope that they -- when combined with similar efforts worldwide -- might prompt a foreign government to respect human rights. Whatever the aspirations of such laws, however, their center of gravity lies at home, not abroad, and their effects -- if any -- are indirect and distinguishable from the direct effects of the regulation of alien inheritances, let alone the effects of a treaty, tariff, or blockade. For these reasons, the Court should read *Zschernig* narrowly and hold that the Massachusetts Burma Law is constitutional.

C. The Complaints of Foreign Countries under a Trade Agreement Do Not Establish Unconstitutional Interference with the Conduct of Foreign Relations.

Nor do the complaints by foreign countries under trade agreements establish that the Burma Law creates "a great potential for disruption and embarrassment" to the conduct of the

foreign relations of the United States. Pet. App. 20, 25, 27. *Barclays* rejected reliance on the "disapproval" of "many of our trading partners," (512 U.S. at 324 n.22), for good reason: on the stage of international politics, the drama never ceases, and each season is full of conflicts, conspiracies, protests, and threats. None of these perennials, however, should influence a *United States* court to nullify the democratic action of the citizens of a State. *See Barclays*, 512 U.S. at 320 ("battalion of foreign governments that has marched to [plaintiff's] aid, [through] diplomatic notes, *amicus* briefs, and even retaliatory legislation . . . [lacks] such force as to dictate th[e] Court's Commerce Clause jurisprudence"); *see id.* at 327-328 (even state action "likely to provoke retaliatory action by foreign governments"is not unconstitutional); *id.* at 324 n. 22 and 337 (O'Connor, J., concurring in judgment).

Judicial reliance on mere trade complaints poses a substantial threat to state legislative action. The United States has entered a new generation of agreements governing international trade and procurement. *See* North American Free Trade Agreement (NAFTA) Implementation Act, P.L. 103-182, 107 Stat. 2057 (1993), 19 U.S.C. §§ 3301 *et seq.*; Uruguay Round Agreement Act of 1994 (URAA), P.L. 103-465, 108 Stat. 4809, 19 U.S.C. § 3501 *et seq*. Under these agreements, Congress has purported to subject hundreds of state laws to review by international bodies. Agreement Establishing the World Trade Organization (WTO), Annex 1B, art. 1, 33 I.LM. 1144 (1994), 1169; 1994 U.S.C.A.A.N. at 4052; 19 U.S.C. § 3312 (NAFTA). Foreign countries have targeted dozens of state laws -- including subsidies, health and safety standards, environmental standards, and taxation -- for attack. *See* European Commission, *Report on*

Barriers to Trade and Investment in the United States (1999). These attacks will multiply if United States courts continue to rely on mere trade *complaints* as the basis for constitutional judgments against state laws.

In this case, the European Union and Japan have challenged the Massachusetts Burma Law under the GATT at the World Trade Organization (WTO). Pet. App. 10, 20, 24. The United States Trade Representative (USTR), however, has pledged a strong defense of the Massachusetts Burma Law at the WTO. R. 425; Jt. App. 206, 82 (unanimous Massachusetts congressional delegation objects to Japanese complaint and urges USTR to defend law as "internal affair[] of Massachusetts"). In these circumstances, the risk of retaliation by other countries under GATT is speculative. If the Executive Branch wishes to avoid retaliation and end foreign complaints -- and the minimal "embarrassment" alleged in this case -- it may bring a judicial action against the State under the URRA. Since it has determined not to do so, the judgment of the court below actually undercuts the power of the Executive by relying on trade complaints that the Executive has determined to resist.

Congressional action further shows that the foreign complaints should be ignored in this case. Congress expected that state laws could be challenged at the WTO under GATT, but it denied a private right of action to enforce GATT in the courts of the United States. *See* 19 U.S.C. §§ 3512(b)(2)(A),3512(c)(1); 1994 U.S.C.A.A.N. at 4055; Arg. I.C, above. The same Congress would be surprised to learn that complaints under GATT now fuel constitutional claims. Furthermore, Congress in 1996 presumably discounted the risk of foreign retaliation when it enacted unilateral sanctions against Burma and left state and local laws

undisturbed. Thus the record of private and governmental actions in this case shows that there is no "great potential for disruption and embarrassment" found by the Court in *Zschernig* in 1968.

Despite these factors, the court below expressly based its constitutional holdings on the complaints made by the European Union and Japan. Pet. App. 24-27. The court's reliance on trade complaints -- inevitable rows in an era of global procurement -- grants to foreign countries and firms a "heckler's veto" against state laws. Absent reversal by this Court, foreign complaints under NAFTA and GATT will increasingly fuel constitutional claims against divestment and selective purchasing laws, "Buy American" laws, environmental regulations, and other state laws. *See* Brief for Non-Profit Organizations, *Amici Curiae*; Brief for Comptroller of the City of New York, *et al.*, *Amici Curiae*. These claims will sap the lawmaking powers of the States and unduly enlarge the role of the courts, casting the judiciary -- inappropriately -- as the "overseer of our government." *Barclays*, 512 U.S. at 330. The Court should reject this role and instead defer to the powers of Congress "to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests." *Perez v. Brownell*, 356 U.S. 44, 57 (1958), *overruled on other grounds, Afroym v. Rusk*, 387 U.S. 253 (1967).

IV. THE BURMA LAW DOES NOT VIOLATE THE FOREIGN COMMERCE CLAUSE.

The court of appeals also ruled that the Burma Law violates the Foreign Commerce Clause, in that it "facially discriminates

against foreign commerce," "interferes with the ability of the federal government to speak with one voice," and "attempts to regulate conduct beyond its borders." Pet. App. 50-57. The court also found that "Massachusetts has failed to put forth a legitimate local justification in support of its law." Pet. App. 57-59.

If the Court holds that the Burma Law represents market participation or that Congress has implicitly permitted the law, the Court must reject the claim under the Foreign Commerce Clause. Even if the Burma Law is subject to review under that clause, however, the Court should reject the claim on its merits.

First, the Burma Law applies equally to firms domiciled in Massachusetts, other States, and foreign countries. Whether a firm is based in Burma or Boston, it is subject to the price preference imposed by the law. The law is therefore distinguishable from laws that discriminate against firms domiciled outside the United States. *See, e.g., Kraft General Foods, Inc. v. Iowa Dep't of Revenue*, 505 U.S. 71, 73-77 (1992).

The law is also distinguishable from state laws that "intend to secure economic advantages for local businesses at the expense of businesses situated elsewhere." *Board of Trustees*, 562 A.2d at 754 (divestment ordinance concerning South Africa does not discriminate). Even a state law that singles out a foreign country does not violate the Foreign Commerce Clause unless it discriminates "in favor of in-state interests." *Id.* at 754 n. 56 (citations omitted). The Massachusetts law clearly does not.

Even if protectionist intent need not be shown, however, a criterion based on commerce with a particular country is not unconstitutional because the "[Foreign Commerce] Clause protects the inter[national] market, not particular inter[national] firms" and does not prohibit a state law that "causes some

business to shift from one inter[national] supplier to another." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (interpreting domestic Commerce Clause). Even if the Burma Law causes some state business t ift from one international supplier to another, this effect would not show unconstitutional discrimination. Thus, for example, if Massachusetts were concerned that state purchases from a particular country might increase the smuggling of heroin onto Massachusetts streets, it could decline to purchase goods from that country. Since the Burma Law does not discriminate against foreign commerce as a class or favor in-state or United States interests, it does not discriminate in violation of the Foreign Commerce Clause.

Nor does the law have an unconstitutional "extraterritorial effect." *See* Pet. App. 55-56. As shown above in Arg. III.B, the effects of the Burma Law are indirect, not inevitable. It does not "impose economic sanctions for violations of its laws" or "regulate conduct wholly beyond its borders." *Id.* The deferential approach of *Barclays* counsels that the Court should not extend the "extraterritorial effect" principle of the domestic Commerce Clause to state laws touching foreign affairs.

In any event, the Court should uphold the law because it has a legitimate local purpose: to disassociate Massachusetts from the human rights violations in Burma. The court below doubted whether an "expression of moral outrage" is a sufficient local interest to satisfy the Foreign Commerce Clause. Pet. App. 58. However, the long history of boycotts in aid of human rights shows that the moral statement made by the Burma Law is a product of tradition and reason and promotes values embodied in the First Amendment. *See First National Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978) (First Amendment promotes a

democratic society by protecting free debate of public issues); Vt. J.H.R. 157 (resolution on conditions in Burma); Vt. Acts of 1999, c. 13 (directions to public pension funds regarding shareholder resolutions on Burma); Ordinance of Oakland, CA (April 23, 1996) (Jt.App. 156) (divestment ordinance concerning Burma). Accordingly, the Court should reject the NFTC's view that state and local resolutions concerning foreign policy are unconstitutional *(see* Jt. App. 232-33) and hold that the moral statement embodied in the Massachusetts Burma Law satisfies the requirement of a legitimate local purpose under the Foreign Commerce Clause.

This moral statement in support of freedom -- freedom from dictators and forced commerce with their vendors -- does not interfere with the ability of the federal government to "speak with one voice" in foreign affairs. *See Barclays*, 512 U.S. at 320 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979)). The court of appeals read this metaphor literally, to warrant the courts to stifle all dissent to national policy, and not merely local actions that are contrary to national policy. *Barclays* and *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), however, show that the "one voice" test never literally forbade multiple *voices* but rather certain types of state *actions* concerning foreign affairs. The statements embodied in selective purchasing and divestment laws "encourage[] ordinary citizens, through the government closest to them, to participate more meaningfully in the formation and carrying out of foreign policies that deeply affect their lives." Bilder, 83 Am. J. Int'l Law at 831. Multiple voices are not *per se* unconstitutional because they do not affect the *capacity* of the Congress to establish uniformity when the national interest so requires.

Where "Congress is aware of state activity to restrict procurement . . . and yet has not yet imposed a policy of national uniformity . . . state procurement policy fits comfortably within the . . . Court's observation that nothing in the Foreign Commerce Clause insists the Federal Government speak with any particular voice." *Trojan Technologies*, 916 F.2d at 912. Under *Barclays*, the Court has left it to Congress -- "whose voice, in this area, is the Nation's -- to evaluate whether the national interest is best served by . . . uniformity, or state autonomy." *Id.* at 331. The court of appeals erred in making its own evaluation of the national interest here.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the United States Court of Appeals for the First Circuit.

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2086

**Counsel of Record*

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IN THE
Supreme Court of the United States

ANDREW S. NATSIOS, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, State Purchasing Agent,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

CORRECTED COPY

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT NATIONAL FOREIGN TRADE COUNCIL

Of Counsel:
MICHAEL A. COLLORA
DAVID M. OSBORNE
DWYER & COLLORA
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 371-1000

TIMOTHY B. DYK
Counsel of Record
GREGORY A. CASTANIAS
JACK W. CAMPBELL IV
JOHN B. KENNEDY
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Respondent

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether the First Circuit correctly held that the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G-22M—which was undisputedly enacted to condemn the Nation of Myanmar and to influence the conduct of its government—unconstitutionally infringes upon the federal government's exclusive authority to regulate foreign affairs.

2. Whether the Massachusetts Burma Law, which discriminates against foreign commerce, violates the "speak-with-one-voice" principle, and seeks to regulate extraterritorial activity in a foreign nation, violates the Foreign Commerce Clause.

3. Whether the Massachusetts Burma Law, which upsets the delicate balance established by federal Myanmar sanctions, is preempted by federal law.

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STATEMENT

The Act of June 25, 1996, Chapter 130, § 1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch. 7 §§ 22G-22M ("the Massachusetts Burma Law"), operates as a secondary boycott of Myanmar (formerly Burma), effectively preventing most companies "doing business" in Myanmar from securing contracts to provide goods and services to Massachusetts agencies. The Law defines "doing business" expansively as: (1) having any place of business, lease, franchise or distribution agreement in Burma; (2) being the majority-owned subsidiary, licensee or franchisee of a company that has such contacts with Burma; (3) providing any goods or services, including financial or consulting advice, to the government of Burma; or (4) "promoting the importation or sale of gems, timber, oil, gas, or other related products, commerce in which is largely controlled by the government of Burma." *See* Mass. Gen. Laws ch. 7, § 22G (hereinafter "MBL").

Under the Law, Massachusetts prepares and circulates a restricted purchase list, based upon "United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources," identifying companies known to do business in Myanmar. § 22J. When Massachusetts decides to add a company to (or delete it from) the list, it requires the company to provide detailed documentation concerning its activities in Myanmar and affirmatively demonstrate to a state official why it should not be listed. J.A. 216-17. State agencies must increase the bid price for goods and services by 10 percent if the bidder is on the restricted purchase list. § 22H(d). Thus, with limited exceptions (§§ 22H(e), 22I), the Law "effectively force[s] businesses to choose between doing business in Burma or

with Massachusetts" (Pet. App. 9a), since the "ten-percent bidding penalty [works] . . . an effective exclusion from the bidding process." Pet. App. 57a.

Massachusetts' purchasing power is substantial, involving more than $2 billion each year. J.A. 225. Massachusetts' avowed purpose in enacting the Law was to use this power to condemn Myanmar and to affect the domestic policies of that nation. The Law's legislative history, wholly ignored by Massachusetts' brief, is revealing. Its sponsor called the Law a "foreign policy" initiative whose "identifiable goal" was "free democratic elections in Burma." Pet. App. 9a; J.A. 39-40. Other Massachusetts legislators described the Law as Massachusetts "engag[ing] in their own little version of foreign policy" (J.A. 35), "set[ting] up some foreign policy business guidelines" (J.A. 46), "dabbl[ing] in foreign affairs" (J.A. 50), and "promot[ing] and stand[ing] for civil and human rights" in Burma. J.A. 53. The Law's proponents lauded it as a vehicle for pressing the federal government to alter its foreign policy toward Myanmar. J.A. 47, 102. The Governor's signing statement said the Law "ma[de] a stand for the cause of freedom and democracy around the world"; he expressed hope that "Congress will follow our example." J.A. 57. Neither the sponsor of the bill, nor the legislators who debated it, nor the Governor who signed it into law mentioned any economic benefit to Massachusetts, its agencies, or its citizens. *See* Pet. App. 10a. The purpose, as Massachusetts conceded below (Pet. App. 9a), was "'to apply indirect economic pressure against the Burma regime for reform.'"

The economic impact of the Law has been significant. When then-Governor Weld signed the Law, he called it "more than symbolic action" that would "affect millions of dollars in state business."[1] The Law covers all of the

[1] Vaillancourt, *Massachusetts Becomes First State to Boycott Burma Business*, Boston Globe, June 26, 1996, at 27.

$2 billion in yearly purchases by Massachusetts and its agencies. Because foreign trade with Myanmar generates nearly $2.3 billion annually in revenues, it is not surprising that companies historically have done business with both Massachusetts and Myanmar. Pet. App. 9a.

The Law's impact is perhaps best measured by the breadth of the restricted purchase list. When this case was filed, the list (J.A. 170-95) contained 346 companies, including 44 U.S. companies (of which 15 were Fortune 500 companies), and many foreign companies with U.S. subsidiaries and affiliates. J.A. 219. The total annual revenue of the publicly traded U.S. companies on the list exceeded $246 billion. *Id.* According to the Law's sponsor, at least 13 companies have exited Myanmar because of the Law's passage. J.A. 100-01. Some NFTC members have chosen to cease doing business in Myanmar to avoid sanctions; others have been penalized by Massachusetts for continuing to do business in Myanmar. Pet. App. 10a, 93a.

The Burma Law departs materially from the approach of a federal statute. In 1996, shortly after Massachusetts enacted the Law, Congress carefully crafted a foreign-relations statute to exress its own disapproval of the political conditions in Myanmar. This statute (i) prohibited all but humanitarian assistance to Myanmar; (ii) directed the Executive Branch to vote against assistance to Myanmar in international financial institutions; and (iii) barred Myanmar officials from entering the United States. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-167 (1996) (hereinafter "OCCA"). The federal statute did not include trade sanctions, but Congress granted the President the power to impose trade sanctions if warranted; even so, the President could restrict only "new investment" in Myanmar, and not contracts for goods, services, or technology. *Id.* §§ 570(b), (c), (f). Congress also directed

the President to develop a multilateral strategy for pressuring Myanmar to change. The President was authorized to waive sanctions if "he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." *Id.* § 570(e).

In May 1997, President Clinton imposed trade sanctions on Myanmar. *See* President's Message to Congress Transmitting Executive Order No. 13,047 (May 20, 1997); Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997). Unlike the Massachusetts Law, the federal sanctions did not penalize companies for doing business in or with Myanmar unless new investment was involved, and they did not apply at all to purchases of goods and services or to foreign companies. The structure and history of the federal law and executive order show that their purpose was to pursue a carefully crafted balance between too-harsh sanctions, which would eliminate the possibility of further influencing the Myanmar regime, and too-lenient sanctions that would be ineffective.[2] Neither the federal law nor the executive order suggested that separate state or municipal action was desirable or appropriate.

In 1996, the procurement expenditures of states and municipalities totaled as much as $730 billion. United

[2] *See* S. 1092, 104th Cong., 1st Sess. (1995) (Congress rejected an amendment that would have prohibited all United States investment in Myanmar); 142 Cong. Rec. S8746 (daily ed. July 25, 1996) (Senator Cohen opposed mandatory sanctions because such sanctions would "relinquish all of [the United States'] . . . remaining leverage in Burma . . . [and] further bind the hands of this and any future administrations, taking away those tools of diplomacy—incentives . . . which are crucial"). *See also* Larson, *State and Local Sanctions: Remarks to the Council of State Governments* (Dec. 8, 1998) at 3-4 ("These measures reflect a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there.") (available at http://ofii.com/resources/legis/remarks.html).

States Dep't of Commerce, *Statistical Abstract of the United States 1999*, at 312 tbl. 512. Numerous state and local governments have used this purchasing power to intrude into foreign policy in a variety of contexts. Following enactment of the Massachusetts Law, at least 16 other jurisdictions enacted similar sanctions.[3] At least six others considered, but then declined to enact, such legislation in part out of concern that it would be an inappropriate and unconstitutional effort to make foreign policy.[4] The ordinances that were adopted are quite similar: "Each contains a preamble referencing and condemning the political practices of the Burmese regime, and several refer to the struggles and valor of Aung San Suu Kyi and other notables who have expressed their opposition to the SLORC regime"; most "includ[e] . . . language purporting to establish a legitimate local purpose in taking a stand against injustice across the world"; and "several . . . include language contemplating their possible constitutional infirmity."[5] Furthermore, private spe-

[3] *See, e.g.*, Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.32 (1999); Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.36 (1999); Amherst, Mass., Annual Town Mtg. Art. 43 (May 14, 1997); Berkeley, Cal., Res. No. 59-853-N.S. (Jan. 12, 1999); Brookline, Mass., Res. Spec. Town Mtg. (Nov. 4, 1997); Cambridge, Mass., City Council Res. (July 27, 1998); Chapel Hill, N.C., Res. 97-1-13/R-16 (Jan. 13, 1997); Los Angeles, Cal., Admin. Code, Ord. No. 138,300 div. 10, art. 12 (1999); New York, N.Y., Local Law No. 33 (May 30, 1997); Newton, Mass., Ord. V-146 (Nov. 3, 1997); Palo Alto, Cal., Res. 7715 (Oct. 20, 1997); Portland, Or., Res. 35710 (July 8, 1998); Quincy, Mass., Municipal Code, Title 2, Ch. 2.48 (1997); Santa Cruz, Cal., Res. NS-23,401 (July 8, 1997); Somerville, Mass., Ord. No. 1998-1, § 2-386 (Feb. 1998); Takoma Park, Md., Ord. 1996-33 (Oct. 1996); West Hollywood, Cal., Municipal Code, Sec. 2701 (1998).

[4] *See, e.g.*, Cal. A.B. 888, 1997-98 Regular Sess. (Cal. 1998); Conn. H.R. 6354, Jan. Sess. 1997 (Conn. 1997); S. 354, 1998 Regular Sess. (Md. 1998); N.C. S. 1054, 1997 Sess. (N.C. 1997); N.Y. A.B. 9147, 1998 Sess. (N.Y. 1998); S. 984, Jan. Sess. 1997 (R.I. 1997).

[5] Schmahmann & Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties With Burma (Myanmar)*, 30 Vand. J. Transnat'l L. 175, 180-83 (1997).

cial-interest groups play a large part in administering these ordinances.[6] State and municipal forays into the field of foreign affairs have been aimed not just at Myanmar, but have extended as well to countries such as Switzerland, China, Saudi Arabia, Northern Ireland, Nigeria, Indonesia, Egypt, Pakistan, Turkey, Sudan, North Korea, Iraq, Morocco, Laos, and Vietnam. *See* Br. *Amici Curiae* of Chamber of Commerce *et al.* at 9-10.

The Massachusetts Law has adversely affected U.S. international relations. Several foreign nations have objected to the Burma Law. Pet. App. 10a. The Association of South East Asian Nations ("ASEAN"), the European Union ("EU"), and Japan have expressed serious concerns to the federal government regarding the Massachusetts Law and publicly stated that the Law has a serious detrimental effect on relations with the United States. Pet. App. 24a-25a. The Law has strained U.S. international, political, and economic relations, focusing, in the words of the EU, "governments on an area of conflict and away from opportunities to achieve shared foreign-policy objectives." Br. *Amici Curiae* of European Communities and Their Member States at 6. In 1997, the EU and Japan each lodged complaints with the World Trade Organization ("WTO"), condemning the Law as a violation of the United States' international obligations. J.A. 88-90, 91-92. State Department officials have characterized state and local sanctions like the Burma Law as "do-[ing] more harm than good" (J.A. 135), and have specifically described the resulting WTO complaints as "an irritant [that] has diverted the United States' and Europe's attention from focussing where it should be—on Burma." J.A. 166.

On April 30, 1998, the NFTC sued the officials charged with administering and enforcing the Burma Law, seek-

[6] *Id.*

ing a declaratory judgment that the Law was unconstitutional, as well as a permanent injunction barring its enforcement. The parties entered into a lengthy stipulation of facts. On cross-motions for summary judgment, both sides agreed that there was no factual dispute, including no dispute concerning the deplorable human-rights situation in Myanmar. After briefing and argument, the district court permanently enjoined enforcement of the Law, holding that the Massachusetts Law "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs." Pet. App. 81a.

On appeal, the First Circuit affirmed, holding that the Burma Law was invalid on three grounds. *First*, the Law "clearly" interfered with the federal government's exclusive power to conduct foreign affairs by "present[ing] a threat of embarrassment to the country's conduct of foreign relations regarding Burma." Pet. App. 22a, 27a. *Second*, the Law "facially discriminate[d] against foreign commerce," regulated extraterritorially, impaired the United States' "one voice" on foreign matters, and did not fall within any possible (though "unlikely") "market-participant" exception to the Foreign Commerce Clause. Pet. App. 48a, 52a. *Third*, the Law "veer[ed] from the carefully balanced path that Congress . . . constructed," and therefore was preempted. Pet. App. 70a, 73a. In this Court, the NFTC's position is supported by *amici curiae* including the EU and its Member States, organizations representing American business, numerous former U.S. government officials, Members of Congress, and others.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 200 years, our national government has employed sanctions against merchants as an instrument of foreign policy. Such sanctions express disapproval of other nations and their policies, and use economic leverage as a means of bringing about change in their conduct.

An enduring tenet of the Framers, and of this Court's decisions, has been that the Constitution reserves such foreign-policy exercises exclusively to the national government. To allow individual state action would undermine national policy and put the Nation at risk. Indeed, specifically barring state sanctions of this type was a particular motivating purpose of the Framers. In the period of 1783-1786, national sanctions against British merchants aimed at reopening the West Indies to American shipping were undermined by states' decisions to impose their own differing sanctions, or no sanctions at all. The lesson thus learned by hard experience suggested the obvious solution—exclusive federal power. The Federalist urged ratification of the Constitution in significant part because federal exclusivity was essential.

There is no single clause in the Constitution allocating foreign-affairs responsibility to the national government, but the Framers well understood that some principles were so inherent in the very structure of the new government that they needed no explicit text: The Constitution accomplished an "alienation of state sovereignty . . . where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *The Federalist No. 32* at 198 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original). The Framers considered state exercises of foreign-affairs power to be "absolutely and totally contradictory and repugnant" to the Constitution's plan of government. This Court has never expressed any doubt on this score, and so held explicitly in *Zschernig v. Miller*, 389 U.S. 429 (1968).

The Massachusetts Burma Law invades that exclusive federal sphere. Massachusetts, by restricting state contracts, has unquestionably sanctioned companies that do business with, and in, Myanmar as a means of condemning that nation and coercing change in its government.

The Law has had its intended effect on companies doing business in Myanmar. Many have ceased doing business with and in Myanmar, or have been penalized for continuing to do so, as a result of the Burma Law. Still others have been coerced by the Law into not entering business relationships in Myanmar. Not unexpectedly, protests by other nations followed enactment of the Burma Law.

The Burma Law also violates the Foreign Commerce Clause. The Law discriminates against companies engaged in commerce with and in Myanmar; it regulates extraterritorially by seeking to control conduct occurring in a foreign country; and it significantly impairs the national government's power to speak with one voice on foreign-commerce matters. No market-participant exception can save the Law, either: The Law admittedly creates no economic benefit to Massachusetts or its citizens; rather, it seeks to use Massachusetts' considerable purchasing power to discourage virtually all commercial transactions involving Myanmar regardless of whether Massachusetts is connected to such transactions in any way. And, on this undisputed record, it is clear that the Law is regulatory, not proprietary—it does not represent the kind of action that any private contracting party would take.

There is likewise no question that the Burma Law conflicts with the federal law imposing sanctions on Myanmar. In 1996, Congress crafted a balanced statute imposing limited sanctions on Myanmar aimed at altering political conditions in that nation. In contrast to the Massachusetts Law, the federal sanctions prohibit only certain new investments, allow trade with Myanmar, and can be modified or terminated by the President in response to human-rights improvements. The Law disrupts the carefully crafted federal balance and impermissibly conflicts with federal policy.

If the Massachusetts Burma Law were allowed to stand, so would dozens of other state and local selective-purchasing laws sanctioning trade with a wide variety of other countries. To date, other jurisdictions have been constrained from enacting similar laws by well-founded concerns as to their constitutionality. A decision by this Court upholding the Burma Law would give 50 state governments and 39,000 other local governments, with their massive purchasing power, free rein to initiate their own versions of foreign policy against any foreign nation. Allowing a thousand, or ten thousand, different foreign policies to bloom would be a detriment to the Nation and contravene the constitutional plan.

ARGUMENT

I. THE BURMA LAW UNCONSTITUTIONALLY INFRINGES UPON THE FEDERAL GOVERNMENT'S EXCLUSIVE FOREIGN-AFFAIRS POWER

Under our Constitution, the conduct of foreign affairs is the responsibility of the federal government, and only the federal government. The historical record of the Constitution, the Federalist Papers, close to 200 years of this Court's precedents, and common sense all confirm this principle. Massachusetts, however, seeks a virtually unfettered right to use its purchasing authority to sanction private companies, with the object of compelling reform in Myanmar. The holding that Massachusetts seeks would effectively remit our Nation's foreign policy to the same confused state of affairs that existed under the Articles of Confederation. Like the courts below in this case, virtually all prior cases in the lower courts have invalidated state laws intruding into the field of foreign affairs.[7] This Court should do the same.

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[7] *See, e.g., Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376 (D.N.M. 1980); *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300, 305, 307 (Ill. 1986); *New York Times Co. v. New York Comm'n on Human Rights*, 393 N.Y.S.2d 312, 317 (1977); *but see Board of Trustees v. Mayor and City Council of Baltimore City*, 562 A.2d 720 (Md. 1989) (upholding Baltimore ordinances requiring city pension funds to divest their holdings in companies doing significant business in South Africa).

A. Prior To The Framing, The Conduct Of Foreign Relations By Individual States Threatened The National Government's Ability To Conduct Effective Foreign Policy

Under the Articles of Confederation, Congress lacked the authority to prevent individual states from conducting their own foreign policy.[8] As a result, individual states and their dissonant voices on foreign affairs repeatedly caused foreign-policy embarrassments to the Nation.

Two prominent foreign-policy episodes under the Articles are particularly pertinent: A number of states (including Massachusetts) enacted legislation barring British merchants from collecting prewar debts that had been guaranteed by the 1783 Treaty of Paris. To protect its merchants, Britain responded by barring the entry of almost all American goods into the British West Indies and refusing to abandon military outposts blocking the Great Lakes fur-trade routes. The effects were devastating to the fledgling American economy. F. Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution*, at 11, 60-66 (1973). Congress dispatched John Adams to reopen British trade and try to head off war. Adams quickly realized that he could gain diplomatic leverage with Britain only if the states were to abide by the terms of the treaty. His pleas to the states to repeal laws that violated the treaty were echoed by others (Jay and Hamilton included) and by Congress. *Id.* at 12-14, 67. In the end, though, "[t]he states would

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[8] *See* Jay, *An Address to the People of the State of New-York On the Subject of the Constitution, Agreed Upon at Philadelphia, The 17th of September 1787*, in *Pamphlets on the Constitution of the United States* 72 (P.L. Ford ed. 1971).

not cooperate despite unremitting labor on the part of Congress and various individuals." *Id.* at 14.[9]

The national government's inability to direct foreign policy and regulate foreign commerce only steeled Britain's intransigence; in fact, many British officials "felt that the United States had no government at all." *Id.* at 56. Lord Sheffield summed up British sentiment: "[N]o treaty can be made with the American states that can be binding on all of them. . . . When treaties are necessary, they must be made with the states separately." *Id.* at 55.

Then a second, related problem surfaced. Unable to secure state compliance with the peace treaty, the Nation took a different tack—it attempted to retaliate against British merchants to force Britain to open the British West Indies to American merchants and to enter into a trade treaty. At Adams' urging, Congress passed a resolution asking the states to cede it a fifteen-year power to prohibit the import and export of goods in British ships and by British residents. The states, despite three years of debate, never complied. 1 J. Story, *Commentaries on the Constitution of the United States* § 262, at 187 (M. Bigelow ed., 5th ed. 1994).

Instead of abiding by national policy, individual states retaliated against Britain in their own widely varying ways, ranging from duties of tonnage to discriminatory taxes on British imports. Marks, *supra*, at 80-81. Most significantly, "[t]here was always some state which refused to discriminate against the British and chose to profit at the expense of its neighbors." *Id.* at 82.[10] For

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9 *See also Oldfield v. Marriott*, 51 U.S. (10 How.) 146, 163-64 (1850) (describing Adams' unsuccessful efforts to establish trade with Britain).

10 *See also* Rakove, *Making Foreign Policy—The View From 1787*, in *Foreign Policy and the Constitution* 1, 2 (R. Goldwin & R. Licht eds. 1990); 1 Story, *Commentaries*, *supra*, § 263, at 187-88.

one, Connecticut left its ports open to capture British commerce that otherwise would have flowed to neighboring states; for another, New Jersey refused to retaliate in the hopes of building up commerce in the port cities of Perth Amboy and Burlington. *See id.* at 82. "[U]nable to endure the consequences of a disadvantaged position," other states soon dropped or refused to enact their own retaliatory measures. *Id.* The states' divergent approaches made a national policy impossible.

The episodes with Britain were hardly the only foreign-affairs disruptions caused by individual states. "Abortive negotiations [for trade treaties] with other powers, notably Austria and Denmark, failed because [of] the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states . . . ." S. Bemis, *A Diplomatic History of the United States* 66 (1936). And when Spain closed the Mississippi River to American shipping in 1784 as part of a border dispute, parochial state interests paralyzed the Nation's foreign policy. While Spain offered some concessions to resolve the dispute, it steadfastly refused to reopen the Mississippi under any circumstances. Southern states viewed reopening of the Mississippi as essential to their economic survival and were willing to provoke war to regain navigational rights. Northern states, having less of an interest in the navigability of the Mississippi River, were all too willing to disclaim navigation rights as a means of stemming westward expansion, depletion of their already scarce labor pool, and a shift of political influence westward. Marks, *supra*, at 24-25, 28. Even though the Nation was desperate to open new markets, and the possibility of war with Spain loomed, the intractable differences in state policies deprived the nation of a coherent foreign policy. *Id.* at 30.

As a consequence of the states following their own individual foreign policies, during the "critical period of

1783-89 American diplomacy was at its lowest ebb and power." Bemis, *supra*, at 83. As Story described the muddled state of our foreign affairs, "[w]e were . . . the victims of our own imbecility, and reduced to a complete subjection to the commercial regulations of other countries, notwithstanding our boasts of freedom and independence." 1 Story, *Commentaries, supra*, § 261, at 186.

B. The Constitution Was Designed To Place Exclusive Control Of Foreign Affairs In The Hands Of The Federal Government

The turmoil caused by the states' individual foreign policies served as a "major drive wheel in the movement for constitutional reform." Marks, *supra*, at 50. "Nothing contributed more directly to the calling of the 1787 Constitutional Convention than did the spreading belief that under the Articles of Confederation Congress could not effectively and safely conduct foreign policy." [11]

The need to consolidate foreign-affairs power in the national government took center stage almost from the start of the Constitutional Convention in 1787. Governor Edmund Randolph introduced his Virginia Plan (upon which the Constitution ultimately was based), by attacking, among other things, Congress' inability under the Articles to prevent individual states from "provok[ing] war" and disrupting efforts to "counterac[t] . . . the commercial regulations of other nations." I *The Records of the Federal Convention of 1787*, at 18-19 (M. Farrand ed. 1966). He also urged that his plan contained "many advantages, which the U.S. might acquire, which were not attainable under the confederation—such as . . . counteraction of the commercial regulations of other nations." *Id.* at 19. The delegates specifically rejected William

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[11] LeFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. Am. Hist. 695, 697 (1987); *accord Oldfield*, 51 U.S. at 164; Marks, *supra*, at 3.

Paterson's competing New Jersey Plan (which continued the basic structure of the Articles of Confederation with a few added congressional powers) because, among other defects, it did not adequately ensure that "no part of a nation shall have it in its power to bring . . . on the whole" the "national calamit[y]" of a "rupture with other powers." J. Madison, *Notes of Debates in the Federal Convention of 1787* at 142 (1966).

Indeed, the Convention delegates were of "virtual unanimity" that foreign-affairs power should be vested exclusively in the national government. Marks, *supra*, at 143.[12] The only disagreement concerned the proper allocation of that power among the branches of the federal government.[13] Ultimately, the delegates divided the foreign-relations authority between the political branches of the federal government, but not with the states.

This division is reflected in the Constitution's text: Article I, Section 8 confers upon Congress a wide array of foreign-affairs-related powers, including the powers to "pay the Debts and provide for the common Defence . . . of the United States" (cl. 1), "regulate Commerce with foreign Nations" (cl. 3), "establish an uniform Rule of Naturalization" (cl. 4), "regulate the Value . . . of foreign Coin" (cl. 5), "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" (cl. 10), and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning captures on Land and Water" (cl. 11). Article II likewise confers a broad array of foreign-affairs au-

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[12] *See also* Denning & McCall, *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 Hast. Const. L.Q. 307, 317 n.51 (1999) (citing sources).

[13] *See* L. Levy, *Original Intent and the Framers' Constitution* 30-53 (1988).

thority upon the Executive. The President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" (§ 2, cl. 1). "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls" (§ 2, cl. 2). The President also "shall receive Ambassadors and other public Ministers" (§ 3).

Conversely, the Constitution emphasizes the lack of foreign-affairs powers in the states. Article I, section 10 states that "[n]o State shall enter into any Treaty, Alliance, or Confederation" or "grant Letters of Marque and Reprisal" (cl. 1). "[W]ithout the Consent of the Congress" states likewise may not "keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War" (cl. 3).

The Constitution does not contain a single "foreign-affairs" clause that explicitly confers all foreign-affairs power on the federal government and excludes the states from all foreign-affairs matters. But the Framers did not expressly spell out each and every instance in which the states' powers were curtailed by the Constitution—even obvious limits on state power such as the power to appoint ambassadors or public ministers. The Federalist Papers, regarded by this Court as "indicative of the original understanding of the Constitution" (*Printz v. United States*, 521 U.S. 898, 910 (1997)), demonstrates this: "[A]lienation of state sovereignty" occurred "where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and *where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.*" *The Federalist No. 32* at 198 (A. Hamilton) (emphasis added in part).

Plainly, the Framers regarded foreign-affairs power as necessary to the proper functioning of a sovereign and independent nation, and concurrent state authority as "totally contradictory and repugnant" to the constitutional plan. The Federalist Papers deconstrates "[t]he importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field." *Hines v. Davidowitz*, 312 U.S. 52, 62 n.9 (1941). They are replete with variations on a central theme: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist No. 42* at 264 (J. Madison). The Constitution's placement of all foreign-affairs power in the hands of the federal government, the authors urged, would solve the most serious problems experienced under the Articles of Confederation: "This alteration [in the structure of the government] is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible." *The Federalist No. 44* at 281 (J. Madison).

The otherwise contentious ratification debates are remarkable for their total lack of disagreement that the federal government should wield exclusive foreign-affairs power. The Anti-Federalists "rarely discussed foreign affairs" (Marks, *supra*, at 196), because they *agreed* with the Federalists on the need for an exclusive federal foreign-affairs power. *See* H. Storing, *What the Anti-Federalists Were For: The Political Thought of Opponents of the Constitution* 27 (1981). The "Federal Farmer," believed to be Richard Henry Lee, wrote that powers "respecting external objects, as all foreign concerns . . ., can be lodged no where else, with any propriety, but in this government."[14] "Agrippa," believed to be James

[14] Letter from the Federal Farmer to the Republican III (Oct. 10, 1787), in 2 *The Complete Anti-Federalist* § 2.8.35, at 239 (H. Storing ed. 1981).

Winthrop, preferred amending the Articles to creating a new Constitution, but he agreed that "the intercourse between us and foreign nations, properly forms the department of Congress."[15] Jefferson, himself hardly a proponent of an expansive federal government, urged even before the Constitutional Convention that a new government should "make us one nation as to foreign concerns, and keep us distinct in Domestic ones . . . ."[16]

Indeed, the First Congress, whose actions are "'contemporaneous and weighty evidence' of the Constitution's meaning" (*Bowsher v. Synar*, 478 U.S. 714, 723 (1986)), clearly viewed foreign affairs as the business of the Nation, not of the states. In addition to enacting statutes that implemented the specific grants of foreign-affairs authority in the Constitution,[17] the First Congress acted more broadly by establishing a Department of Foreign Affairs (Act of July 27, 1789, 1 Stat. 28) and appropriating funds for the conduct of "intercourse between the United States and foreign nations." Act of July 1, 1790, 1 Stat. 128. Massachusetts itself recognized the new national order: In 1790, the Commonwealth became concerned that British subjects were making encroachments on its eastern boundary in violation of the Treaty of Paris; but rather than retaliate, the legislature passed a resolve directing the governor to communicate the Commonwealth's

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[15] Letters of Agrippa (Jan. 14, 1788), in 4 *The Complete Anti-Federalist* § 4.6.54, at 98.

[16] Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), in 10 *Papers of Thomas Jefferson* 603 (J. Boyd ed. 1954).

[17] *See, e.g.*, Act of July 4, 1789, 1 Stat. 24 (laying duties on imports); Act of July 20, 1789, 1 Stat. 27 (imposing duties of tonnage); Act of March 26, 1790, 1 Stat. 103 (establishing a uniform rule of naturalization); Act of Apr. 30, 1790, 1 Stat. 112 (punishing certain crimes, including treason and piracy); Act of March 3, 1791, 1 Stat. 214 (appropriating funds to conclude a treaty with Morocco).

concern to the President for further action. Resolve of Feb. 1, 1790, ch. 42, 1789-1790 Mass. Resolves 635.

C. A Long And Unbroken Line Of This Court's Decisions Has Held That The Foreign-Affairs Power Is Vested Exclusively In The Federal Government

This Court has repeatedly shown the same "concern for uniformity in this country's dealings with foreign nations" (*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)), shared by both the proponents and opponents of the Constitution. In 1840, Chief Justice Taney wrote:

> Every part of [the Constitution] shows that our *whole foreign-intercourse* was intended to be committed to the hands of the general government . . . . It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; *and to cut off all communications between foreign governments, and the several state authorities.*

Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840) (opinion of Taney, C.J.) (emphasis added). The Court's decisions since have reflected the same view, variously describing the national government's authority over foreign relations as "full and exclusive," "entirely free from local interference" (*Hines*, 312 U.S. at 63), and "not shared by the States [but] vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). The rule that comes out of these decisions is straightforward: As to foreign relations, the national government's jurisdiction is not merely concurrent with the states', it is exclusive.[18]

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[18] *See also, e.g., Sabbatino*, 376 U.S. at 427 n.25 ("Various constitutional . . . provisions . . . reflec[t] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of the federal institutions."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of foreign relations generally, state lines

In the course of those decisions, this Court has unequivocally rejected the argument made by the Commonwealth (Pet. Br. 41-42) that the Constitution's specific enumerations of particular foreign-affairs powers define the limits of federal exclusivity: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true *only in respect of our internal affairs*." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936) (emphasis added). The "entire control of international relations" is vested in the federal government not just because of the Constitution's specific textual provisions, but due to the United States' status as a "sovereign and independent nation." *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).[19] This Court has noted that the

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disappear."); *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *United States v. Arjona*, 120 U.S. 479, 483 (1887) ("The Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries."); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 555 (1870) (Bradley, J., concurring) (the national government "is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments").

[19] *Accord, e.g., Curtiss-Wright Export Co.*, 299 U.S. at 318 ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."); *Burnet v. Brooks*, 288 U.S. 378, 396 (1933) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.").

states' sovereign immunity "neither derives from nor is limited by the terms of the Eleventh Amendment" (*Alden v. Maine*, 119 S Ct. 2240, 2246-47 (1999)) because that amendment merely "confirms" the "presupposition" that immunity is an aspect of state sovereignty retained after the ratification of the Constitution. *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). So too the Constitution's specific foreign-affairs provisions "confirm" the "presupposition" that, as a sovereign and independent nation, the United States commands the entire foreign-relations power.

This Court's foreign-relations decisions culminated in *Zschernig v. Miller*, 389 U.S. 429 (1968), which relied upon *Hines* and other authorities to conclude that "foreign affairs and international relations" are "matters which the Constitution entrusts *solely* to the Federal Government." *Id.* at 436 (emphasis added). *Zschernig* involved a facially neutral Oregon probate law that conditioned the inheritance rights of a nonresident alien upon the alien's ability to demonstrate that his country of origin would grant reciprocal rights to a U.S. citizen, and would not confiscate any of the inherited property. *Id.* at 430-31. However, under the Oregon law, judges searched "for the 'democracy quotient' of a foreign regime." This use of the law had "great potential for disruption or embarrassment" (*id.* at 435), "affect[ed] international relations in a persistent and subtle way," and "impair[ed] the effective exercise of the Nation's foreign policy." *Id.* at 440. The law thus intruded impermissibly into "matters which the Constitution entrusts solely to the Federal Government." *Id.* at 435-36. The Court concluded that the exclusive federal authority to regulate foreign relations is violated by state or local laws that have more than an "incidental or indirect effect in foreign countries," or that have "great potential for disruption or embarrassment" of United States foreign policy (*id.* at 434-35), "even in the absence of" federal action. *Id.* at

441. This Court reached this conclusion even though the United States as *amicus curiae* urged that Oregon's application of the statute did not unduly interfere with the Nation's conduct of foreign relations. *Id.* at 434; *see also id.* at 443 (Stewart, J., concurring). And, since *Zschernig*, the Court has continuously reaffirmed that the federal foreign-affairs power is not merely supreme to, but completely "exclusive" of, the states.[20]

Massachusetts urges (Pet. Br. 38) that *Zschernig* may simply be ignored as "unique." As shown above, constitutional history, structure, and case law before and since *Zschernig* refute this assertion and demonstrate that the federal power in this area is indeed an "exclusive" one. In fact, long before *Zschernig*, both this Court and numerous commentators viewed the existence of an exclusive federal foreign-affairs power as an uncontroversial and well-settled proposition.[21]

Massachusetts also urges (Pet. Br. 46) that—despite this longstanding approach—this Court should "reject"

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[20] *See Perpich v. Department of Defense*, 496 U.S. 334, 353 (1990); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n.7 (1984).

[21] *See, e.g.*, S. Weaver, *Constitutional Law and Its Administration* § 77, at 103 (1946) ("In speaking of foreign affairs, our government is strictly national."); H. Rottschaefer, *Handbook of American Constitutional Law* 382 (1939) ("The conduct of the foreign relations . . . lies within the exclusive competence of the national government."); I W. Willoughby, *The Constitutional Law of the United States* § 189, at 450-51 (1910) ("The exclusiveness of the federal jurisdiction in all that concerns foreign affairs is deducible . . . from the national character of the General Government, . . . from the express provisions of the Constitution, . . . [and] the intention of the framers of the Constitution to invest the Federal Government with the exclusive control of foreign affairs."); H. Black, *Handbook of American Constitutional Law* 21 (1895) ("[A]ll authority over foreign relations and affairs is confided to the national government [and] all such authority is denied to the separate states."); T. Cooley, *Constitutional Limitations* 128 (1868) ("[A]ll international questions belong to the national government.").

any judicial role in protecting the exclusive federal foreign-affairs power, and instead leave resolution of any such conflicts to the "powers of Congress." This argument attempts to revive the "congressional negative" as the sole method of protecting the federal government from state usurpations of its powers, an approach the Framers found to be decidedly unsatisfactory, even when coupled with judicial review. The history of the Constitution demonstrates that "encroachments by the states on the federal authority [are] numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation."[22] The Framers "t[ook] for granted" that judicial review would serve to prevent this encroachment.[23]

While the delegates to the Constitutional Convention debated granting Congress a power to negative state laws (and in fact adopted the Supremacy Clause making federal law the supreme law of the land), even the proponents of a congressional negative did not suggest that it could possibly operate as a substitute for judicial review, but only as a complementary adjunct.[24] They viewed the political branches as too beholden to state interests—and thus "likely to beget a disposition too obsequious" toward them—to serve as an effective check on state encroachments. *The Federalist No. 45* at 291 (J. Madison). Indeed, the national judiciary, although "established under the general Government," would "impartially" police the "boundary between the two jurisdictions . . . according to the rules of the Constitution; and all the usual and most effectual precautions [would be] taken to secure this im-

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[22] Madison, *Vices of the Political System of the United States*, in *The Mind of the Founder: Sources of the Political Thought of James Madison* 83 (M. Myers ed. 1973).

[23] R. Fallon *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 11-12 (4th ed. 1996).

[24] *Id.*; *see also* C. Warren, *The Making of the Constitution* 316-24 (1928); J. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 171-77 (1996).

partiality." *The Federalist No. 39* at 245-46 (J. Madison). Massachusetts' suggestion that enforcement of the exclusive federal foreign-affairs power be placed solely in the hands of Congress would constitute nothing less than a wholesale rejection of the Framers' plan, which has been recognized by this Court since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Zschernig correctly accords with the Framers' plan by holding that the judiciary is fully capable of determining whether a state or local action is an exercise in foreign affairs, and thus an unconstitutional state encroachment on federal powers. *See* 389 U.S. at 440-41; *see also De-Canas v. Bica*, 424 US. 351, 355-56 (1976). And that judicial role is critical: The political branches of the national government, which are charged with making foreign policy, simply do not have the time and resources to monitor and police myriad state and local foreign-policy initiatives. J.A. 116.[25]

As the Court recognized in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), Congress cannot be expected to "anticipate and legislate with regard to every possible [foreign-relations] action the President may find it necessary to take or every possible situation in which he might act." *Id.* at 678. If Congress cannot be expected to "anticipate and legislate" with respect to the actions of a single Executive, it cannot possibly be expected to respond to foreign-affairs legislation and ordinances passed by 50 states and 39,000 local governments. Even if the political branches were to attempt such monitoring and enforcement, their reaction might well come far too late to avoid international repercussions. *See* Moore. *Federalism and Foreign Relations*, 1965 Duke L.J. 248, 253.

Most significantly, as the experience under the Articles of Confederation demonstrated, Congress would often be

[25] *See also* Br. *Amici Curiae* of Members of Congress Supporting Respondent at 27.

institutionally incapable of acting because of conflicting state interests. The present record serves as a vivid reminder of the virtual certainty of such conflict. A number of Senators and Representatives, including the entire Massachusetts delegation, have supported Massachusetts in this Court. Other Senators and Representatives have supported the position of the NFTC.[26] The concerns that the Framers had 200 years ago—about the ability of the national government to exercise effective control over state encroachments into the federal domain—are just as valid today as they were then.

D. The Burma Law Is A Foreign-Policy Measure That Intrudes Into The Exclusive Federal Sphere

As its primary line of defense, Massachusetts urges that the Burma Law is not a foreign-policy measure at all, but simply a law addressing a matter of "local" concern—that Massachusetts' spending might be viewed as supporting Myanmar. In Massachusetts' view, the statute is simply an effort to "disassociate" Massachusetts from Myanmar and has only an indirect effect on foreign affairs. Pet. Br. 32, 45.

In making this argument, Massachusetts ignores the history and objectives of its Law, its concessions below, and the demonstrated effect of the Law on numerous companies and U.S. foreign relations. There is nothing local about either the objectives of the Burma Law or its effects. The Burma Law was designed to, and does, conduct Massachusetts' "own little version of foreign policy" (J.A. 35), with the "identifiable goal [of] free democratic elections in Burma" (J.A. 39-40); indeed, Massachusetts concedes that its goal is "to promote human rights in Burma." Pet. Br. 21. It directly affects companies doing business in Myanmar and has evoked pro-

[26] *See* Br. *Amici Curiae* of Members of Congress Supporting Respondent; Br. *Amici Curiae* of Members of Congress Supporting Petitioner.

tests by foreign nations. This Court has itself recognized that secondary boycotts are not mere "disassociative" actions, but are heavily coercive. In *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, 456 U.S. 212 (1982), the Court held unlawful, under the NLRA, a union's refusal to handle cargo arriving from or destined for the Soviet Union to protest the invasion of Afghanistan. *See id.* at 214-15. The Court rejected the union's argument that the secondary boycott "simply . . . free[d] . . . members from the morally repugnant duty of handling Russian goods." *Id.* at 224. Rather, it held that such secondary boycotts "threaten neutral parties" (*id.* at 224 (internal quotation marks omitted)) on whom they impose a "heavy burden." *Id.* at 223.

Thus, the Burma Law, in both design and effect, sanctions private companies that do business with Myanmar. This is a typical foreign-policy measure. As discussed above (*see supra* pp. 12-13), such governmental boycotts have been used to conduct foreign policy at least since the time of the Articles of Confederation. And even today, the federal government frequently sanctions private companies doing business with foreign regimes to express the United States' displeasure and to attempt to change those regimes.[27] Despite Massachusetts' efforts to dress its actions in proprietary garb, it is perfectly clear that Massachusetts is doing exactly the same thing with the Burma Law, and the Law thus intrudes into the exclusively federal sphere.

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[27] *See, e.g.*, Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (prohibiting transactions with Cuba); Iran-Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (Iran, Libya); Exec. Ord. No. 13 067, 62 Fed. Reg. 59,989 (1997) (Sudan); Exec. Ord. No. 13,059, 62 Fed. Reg. 44,531 (1997) (Iran); Exec. Ord. No. 12,810, 57 Fed. Reg. 24,347 (1992) (Yugoslavia); Exec. Ord. No. 12,722, 55 Fed. Reg. 31,803 (1990) (Iraq); Exec. Ord. No. 12,543, 51 Fed. Reg. 875 (1986) (Libya).

Even if the Burma Law were not utilizing such a traditional foreign-relations tool, it nonetheless would be unconstitutional under *Zschernig*. *Zschernig* holds that state statutes, even if nominally local in character, can intrude "into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432. Both *Zschernig* and its predecessor, *Clark v. Allen*, 331 U.S. 503 (1947), involved state probate statutes with reciprocity requirements. In *Clark*, this Court did not discern an attempt by California to make foreign policy by criticizing foreign regimes; accordingly, the statute's effect was necessarily indirect and thus permissible. *Id.* at 517. *Zschernig* was quite different. There it was clear that the Oregon courts were using their probate statute to launch inquiries into the "types of governments that obtain in particular foreign nations" (389 U.S. at 434) and to criticize specific "nations established on a more authoritarian basis than our own." *Id.* at 440. This had "great potential for disruption or embarrassment" in U.S. diplomatic matters (*id.* at 435), rendering the probate law unconstitutional. *Id.* at 441. The Court specifically noted that "[h]ad [*Clark*] appeared in the posture of the present [case], a different result would have obtained." *Id.* at 433 & n.5. The Burma Law is indistinguishable from the law invalidated in *Zschernig*. "[T]he purpose of the statute"—to criticize and affect the government of Myanmar—is obvious from its face as well as from its history and operation. That alone is sufficient to invalidate it. Even Massachusetts appears to recognize that it can win this case only if *Zschernig* is "cabined to its facts." Pet. Br. 41.

Significantly, the Burma Law raises all of the concerns—reflected in the Court's decision in *Zschernig* and other cases—that led the Framers to make foreign affairs an exclusively federal domain.

First, individual states lack the expertise to create or enforce their own foreign policy.[28] Indeed, the Constitution stripped the states of the administrative mechanisms necessary to conduct an effective foreign policy: States were denied the authority to appoint or receive ambassadors (*see, e.g., Holmes*, 39 U.S. at 577 (Taney, C.J.)), and denied the power to make war or to maintain an army or navy in time of peace. U.S. Const. art. I, § 10. Likewise, states have no access to the federal intelligence apparatus, which is "essential to a successful foreign policy process." [29] Lacking access to these "vital" and "essential" tools, Massachusetts and other jurisdictions instead have turned to self-interested and unaccountable private sources—like the Investor Responsibility Research Center—to develop and administer the Burma Law and similar statutes. *See* MBL § 22J; Schmahmann & Finch, 30 Vand. J. Transnat'l L. at 199-200. The dangers of allowing such private parties to formulate foreign policy are obvious.

Second, state foreign policy may conflict with that of the federal government, making the national foreign policy less clear, effective, and credible.[30] Questions of foreign policy "uniquely demand single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Conflict between the national government and the states would likewise impair "the flexibility . . . to respond to changing world conditions" (*Mathews v. Diaz*, 426 U.S. 67, 81 (1976)) that is so critical to today's "changeable and explosive" international relations. *Zemel*

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[28] *See* Br. *Amici Curiae* of Former U.S. Gov't Officials at 14-15.

[29] *The Role of Intelligence in the Foreign Policy Process: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. at vii (1980). *See also Snepp v. United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam) ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.").

[30] *See* Br. *Amici Curiae* of Former U.S. Gov't Officials at 11-13.

v. Rusk, 381 U.S. 1, 17 (1965). Moreover, as the EU points out, destruction of the one-voice principle would force foreign nations to deal with individual states on foreign-policy matters, something those nations "simply cannot [do]." [31]

The conflicts between the Burma Law and the federal approach are evident. *See infra* pp. 44-46. Even if these conflicts were not sufficient to preempt the statute, which they surely are, the divergence of the Burma Law from the federal sanctions creates a serious risk of "adversely affect[ing] the power of the central government to deal with those problems." *Zschernig*, 389 U.S. at 441. Ranking officials of the State Department have recognized that such state and local sanctions potentially "impede the President's and Secretary of State's conduct of foreign policy." J.A. 164; *see* Larson, *State and Local Sanctions: Remarks to the Council of State Governments* (Dec. 8, 1998) at 4.

State foreign-policy laws are particularly problematic when the national government views official silence as an appropriate means of conducting diplomacy,[32] or believes that economic engagement with a foreign nation is the preferred means of fomenting change. J.A. 109.[33] State and local sanctions would force the national government to speak out to invalidate state law, even if the national government were to view silence as a superior diplomatic strategy, and they blunt the national government's ability

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[31] Br. *Amici Curiae* of the European Communities and Their Member States at 5.

[32] *See* Maier, *The Bases and Range of Federal Common Law In Private International Matters*, 5 Vand. J. Transnat'l L. 133, 169 (1971) (official silence may "serve international commercial or political interests related to the desirability of continuing communication between the two countries").

[33] *See* Br. *Amici Curiae* of Members of Congress Supporting Respondent at 20-21.

to create economic incentives that reward favorable changes in a foreign nation's human-rights record. J.A. 120, 133. Even where the national government has not stood silent, state and local sanctions like the Burma Law often linger well past the national government's decision to cease sanctions against a foreign nation.[34]

Third, one state's action may carry severe consequences for the nation as a whole—objections by foreign governments, refusal of foreign concerns to do business with U.S. entities because U.S. foreign policy is viewed as unreliable, or, in an extreme case, even war. These dangers were vividly demonstrated by the incidents that occurred under the Articles of Confederation. *See supra* pp. 11-14. The Federalist urged that because "[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members . . . [t]he responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *The Federalist No. 80* at 476 (A. Hamilton). Another pertinent passage cautioned that if each state could go its own way, foreign states would refuse to conclude trade treaties with the Nation.

> No nation acquainted with the nature of our political association would be unwise enough to enter stipulations with the United States, conceding on their part privileges of importance to them, while they were apprised that the engagements on the part of the Union might at any moment be violated by its members, and while they found from experience that they might enjoy every advantage they desired in our markets without granting us any return but such as their momentary convenience might suggest.

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[34] *See* Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw. J. Int'l L. & Bus. 563, 565 (1993) (over 100 state and local laws sanctioning South Africa remained in force after the United States dismantled its sanctions in response to the abolition of apartheid).

The Federalist No. 22 at 143-44 (A. Hamilton). So too this Court has recognized that "[t]he national government is . . . responsible to foreign nations for all violations by the United States of their international obligations." *Arjona*, 120 U.S. at 483; *accord* Restatement (Third) of the Foreign Relations Law of the United States § 207 (1987).

The Burma Law is threatening similar consequences to the Nation.[35] Japan, the EU, and ASEAN have complained that the Law violates the United States' international obligations, including its obligations under the WTO's "Government Procurement Agreement." J.A. 88-92. While the Burma Law has not yet led to retaliation by other countries, that possibility remains a real one. If adverse consequences result, it will be the duty of the federal government to deal with them. And while the Burma Law will not lead to war with Myanmar, trade sanctions can have that effect: The United States' escalating embargo against Japan in the late 1930s and early 1940s ultimately culminated in the bombing of Pearl underHarbor. R. Ellings, *Embargoes and World Power: Lessons From American Foreign Policy* 121-22 (1985).

Finally, all of these concerns about conflict, interference, and multiple voices are magnified where multiple jurisdictions are involved with the potential for serious conflict among them. In *Zschernig*, the Court noted that the foreign-relations impact of the Oregon law was even greater given that similar laws were in force in other states. 389 U.S. at 433-34, 437 n.8. *See also Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). Likewise, the foreign-relations implications of the Burma Law are "magnified when Massachusetts is viewed as part of a broader pattern of state and local intrusion." Pet. App. 23a. Indeed, Massachusetts "hope[s]" that "when combined with similar efforts worldwide" the Law will "prompt a foreign government to respect human rights."

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[35] *See* Br. *Amici Curiae* of Former U.S. Gov't Officials at 7-8.

Pet. Br. 43. States and municipalities increasingly are adopting "laws, ordinances, and resolutions that target multinational corporations 'doing business' in countries of concern."[36] Were this Court to reverse the Court of Appeals, it is virtually certain that the amount of similar state and local legislation would increase exponentially: 21 states and 16 municipalities have come to this Court as *amici* seeking the power to enact selective purchasing laws, and the public and certain nature of this Court's decisions would surely encourage many more to follow suit if state power in this area were sustained, further straining U.S. foreign relations.[37] Conflict among such enactment would be inevitable in many contexts.

What has already been said should dispel Massachusetts' unprecedented suggestion (Pet. Br. 25) that the Burma Law is insulated from constitutional scrutiny by a "market-participant exception" to the exclusive federal foreign-relations power. Even putting aside the fact that Massachusetts is acting as a market regulator and not a mere "participant" (*see infra* pp. 36-42), there would be no basis whatsoever for extending this "narrow exception" (*Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 588 (1997)) beyond its role under the Interstate Commerce Clause. Indeed, in *United Building & Construction Trades Council v. Mayor & Council of Camden*, the Court "decline[d] to transfer mechanically" the market-participant exception—"an analysis fashioned to fit the Commerce Clause"—onto the Privileges and Immunities Clause of Article IV. 465 U.S. 208, 219 (1984). The reason was that "[t]he two Clauses have different aims and set different standards

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36 Investor Responsibility Research Center, *State and Local Selective Purchasing Laws As of September 1997*, at 1 (copy lodged with the Court on December 31, 1999).

37 *See* Br. *Amici Curiae* of the European Communities and Their Member States at 4.

for state conduct." *Id.* at 220. So too with the exclusive foreign-relations power: Concerns that the Nation be able to conduct its foreign affairs effectively and in accord with principles of international law "cu[t] across the market regulator-market participant distinction that is crucial under the [Interstate] Commerce Clause." *Id.* As the Burma Law itself demonstrates, and as Massachusetts concedes, even a law characterized as mere participation in a marketplace can make foreign policy because "spending decisions will inevitably rile foreign countries and . . . risk embarrassment to the United States." Pet. Br. 11.

In sum, the Burma Law is an unconstitutional exercise of foreign-affairs power by the Commonwealth. It suffers from all of the inherent defects of state foreign-affairs efforts that led the Framers to exclude the states from conducting foreign policy. This Court should affirm.

II. THE BURMA LAW VIOLATES THE FOREIGN COMMERCE CLAUSE

The Court of Appeals also correctly held that the Burma Law violates the Foreign Commerce Clause.

A. The Burma Law Discriminates Against Foreign Commerce, Seeks To Regulate Extraterritorial Conduct, And Interferes With The National Government's One Voice On Foreign Commercial Relations

1. *The Burma Law Is Discriminatory.* Discriminatory restrictions on interstate commerce are "virtually *per se* invalid";[38] the same goes for laws that discriminate against foreign commerce.[39] Over a century ago, the Court explained that "one main object of the Constitution" was preventing "discriminations favorable or adverse

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38 *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994).

39 *See, e.g., Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 313-14 (1994); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71, 75-77 (1992).

to commerce with particular foreign nations [that] might be created by State laws." *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317 (1851). The Burma Law plainly fails this constitutional test—it singles out commerce with and in Myanmar and treats that commerce less favorably than it does domestic and other international commerce. Pet. App. 51a.

This Court has repeatedly invalidated state laws that discriminate against a particular foreign jurisdiction,[40] and even Massachusetts' *amici* admit that the Burma Law "facially discriminates against foreign commerce." Br. *Amici Curiae* of Council of State Governments *et al.* at 20. Massachusetts' own cursory defense of the discrimination seems to be an afterthought. Massachusetts contends (Pet. Br. 47) that the Burma Law is "distinguishable" from other laws that violate the Foreign Commerce Clause because it "applies equally" to firms within and without Massachusetts, and does not favor in-state interests. As the Court of Appeals recognized (Pet. App. 52a), this Court explicitly rejected this argument in 1992 in *Kraft*: "As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions." 505 U.S. at 79.

2. *The Burma Law Regulates Extraterritorially.* As the Court of Appeals held (Pet. App. 55a-57a), the Burma Law is impermissible under the Commerce Clause for yet another reason: It seeks to regulate commerce far beyond the borders of Massachusetts. For more than a century, this Court has recognized that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). That is so because no single state can "impose its own

[40] *See, e.g., New Energy Co. v. Limbach*, 486 U.S. 269, 276 (1988); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977).

policy choice[s] on neighboring States." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996). In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down a New York liquor-pricing statute because it "regulate[d] out-of-state transactions in violation of the Commerce Clause." *Id.* at 582. Just as state laws directly regulating commerce in other states violate the Interstate Commerce Clause, so too laws directly regulating commerce in foreign countries violate the Foreign Commerce Clause.

Massachusetts concedes that the Burma Law is intended to "promote human rights" (Pet. Br. 21) and "encourage change" in Myanmar (Pet.. Br. 31); the Law also directly regulates the activities of hundreds of foreign companies. J.A. 219. The Law is plainly an attempt to legislate extraterritorially, as the Court of Appeals properly concluded. Pet. App. 56a. Indeed, were the Law upheld, one can imagine a panoply of similar laws that would follow, with an adverse effect on *interstate* commerce: A municipality could insist that government contractors require their employee-benefit plans to cover same-sex workers wherever located (*see Air Transport Ass'n v. City and County of San Francisco*, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998) (striking down similar laws on Commerce-Clause extraterritoriality grounds)); likewise, an anti-death penalty state (*e.g.*, Massachusetts) could insist on trading only with companies that refuse to do business in or with states where the death penalty is imposed (*e.g.*, Texas).

3. *The Burma Law Impairs the Federal Government's "One Voice" on Foreign Commerce Matters.* Finally, the Law significantly impairs the ability of the federal government to "speak with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (quotation omitted). The requirement derives from the

long-recognized fact that "[f]oreign commerce is preeminently a matter of national concern." *Id.* at 448. Thus, although a law may not run afoul of the Foreign Commerce Clause if it "merely has foreign resonances, but does not implicate foreign affairs," a law that "implicates foreign policy issues . . . must be left to the Federal Government." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

Part I of this brief describes at length why the Burma Law interferes with the federal power over foreign affairs; that showing also demonstrates that the Law violates the "speak-with-one-voice" principle. But the Foreign Commerce Clause goes further than the foreign-affairs analysis in one important respect—it applies even if a state law is not designed or used to make foreign policy, so long as the law has a substantial effect on international relations. In *Container Corporation*, the Court emphasized that "the threat [a law] might pose of offending our foreign trading partners" is an important aspect of Foreign-Commerce-Clause analysis. 463 U.S. at 194. As discussed above, that effect is clearly present here. The Burma Law has already caused considerable international tensions involving Japan, the ASEAN, and the EU. *See supra* p. 6. Furthermore, as discussed in Part IV below, no congressional "approval" saves the Law from challenge under the "one-voice" principle.

B. The Market-Participant Exception Does Not Save The Burma Law Because The Law Is Regulatory, Not Proprietary

Petitioners expend their maximum effort (Pet. Br. 25-36) to urge that a "market-participant exception" should insulate the Burma Law from Commerce-Clause scrutiny. The Court of Appeals rejected this argument (Pet. App. 42a-50a), as should this Court.

The "market-participant exception" is based on the notion that states, when they are participating in a market

in a proprietary fashion, are not bound by the Interstate Commerce Clause. *See Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Notably, the Court has twice reserved the question of whether the "market-participant exception" applies to save otherwise unconstitutional discrimination against foreign commerce. *See Reeves*, 447 U.S. at 437 n.9; *South-Central Timber*, 467 U.S. at 92 n.7. But, like the Court of Appeals (Pet. App. 48a-50a), this Court need not reach the issue in this case, for the Burma Law is classic regulation, not market participation.

This Court's cases, both in Commerce-Clause and preemption contexts, seek to determine whether an exercise of a state's spending power is regulatory or proprietary. Under those cases, the Burma Law is manifestly regulatory, not proprietary.

In three Interstate-Commerce-Clause cases, this Court has found state action to be proprietary. In one, the state's action was limited to a single facility. In *Reeves, Inc. v. Stake*, the Court allowed a South Dakota-owned cement plant to prefer residential sales over out-of-state sales. 447 U.S. at 437, 446-47. In two other cases, somewhat broader programs were sustained. In *Hughes v. Alexandria Scrap Corp.*, the Court permitted Maryland to purchase scrap automobiles solely from in-state scrap processors to help rid the state of junk cars. 426 U.S. at 809-10. And in *White v. Massachusetts Council of Construction Employers, Inc.*, the Court upheld a mayoral order requiring all City of Boston-funded construction projects to be performed by a work force comprised of at least 50% bona fide Boston residents. 460 U.S. 204, 209-10, 214-15 (1983). Collectively, these cases establish that a state "acting in its proprietary capacity . . . may 'favor its own citizens over others.'" *Camps Newfound/Owatonna*, 520 U.S. at 592-93.

In *White*, the Court cautioned that the market-participant exception is not a vehicle by which states may engage in free-ranging regulatory efforts: "[T]here are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." *Id.* at 211 n.7. As an illustration, the Court cited (*id.* at 210-11) *Hicklin v. Orbeck*, a case striking down a wide-ranging Alaska preferential-hiring statute that applied to every company with any remote connection to the sale of Alaskan oil and gas leases. *See* 437 U.S. 518, 531 (1978). Likewise, in *South-Central Timber*, the plurality held that an Alaska statute requiring all purchasers of state-owned timber to process that timber in-state was downstream regulation, not proprietary activity. *See* 467 U.S. at 99 (plurality op.).

A similar proprietary-regulatory distinction has proven crucial in preemption cases where a state attempts to justify its intrusion into a federal sphere as market participation. While those cases suggest that more stringent restrictions on market activity may exist in the preemption context, they provide valuable guidance as to whether a state action is proprietary or is in fact regulatory. In *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, the Court held that a Wisconsin contract debarment statute designed to enforce the NLRA was "tantamount to regulation," and not a proprietary action. 475 U.S. 282, 289 (1986). In *Chamber of Commerce v. Reich*, the District of Columbia Circuit held that an Executive Order authorizing the Secretary of Labor to bar employers from federal contracts because they hired permanent replacement workers during a lawful strike was a regulatory action. 74 F.3d 1322, 1335-36 (D.C. Cir. 1996). This Court in *Building and Construction Trades Council v. Associated Builders and Contractors* held that a pre-hire labor agreement between a

Massachusetts agency and a union was proprietary because it was tailored to a specific job by a state agency acting "just like a private contractor." 507 U.S. 218, 221-23, 227-30 (1993).

By any measure, the Burma Law is not a proprietary state action. *First*, unlike the scrap-car purchasing program in *Alexandria Scrap*, the cement-sales program in *Reeves*, and the hiring preference in *White*, the Burma Law does not favor the commercial interests of Massachusetts or its residents. Even Massachusetts' *amici* recognize that the "[L]aw imparts no economic benefit to the Commonwealth or its taxpayers." *See* Br. *Amici Curiae* of the Council of State Governments *et al.* at 20. The Law's stated purpose is to benefit citizens of distant Myanmar by fomenting "free democratic elections in Burma." J.A. 40. This purpose is not economic; it is not even local. Thus, contrary to Massachusetts' suggestion (Pet. Br. 33), the Law bears no resemblance to the scrap-car purchasing program in *Alexandria Scrap*, which, as a result of conferring a local economic benefit to scrap processors, also conferred a local aesthetic benefit—removal of hulks from Maryland roadways—to the "public." *See* 426 U.S. at 796-97, 809-10.

Second, unlike the state programs upheld in *Alexandria Scrap*, *Reeves*, and *White*, the Burma Law does not operate in the "market" in which Massachusetts is "participating." As the plurality concluded in *South-Central Timber*, the market-participant doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." 467 U.S. at 97 (plurality op.). Even if a state spending program were designed to create a local economic benefit, the state cannot use that program to affect a trading partner's separate lines of business. But that is precisely

what the Burma Law does. For instance, under the Law, Massachusetts would refuse to acquire office supplies from a large corporation with a foreign subsidiary that imports raw timber from Myanmar, even if Massachusetts were not in the market to purchase raw timber. This type of secondary boycott takes the Law far outside of the proprietary arena. *See White*, 460 U.S. at 210-11; *Building & Construction Trades Council*, 507 U.S. at 227, 230.

The Burma Law is much like the laws that were not insulated by a market-participant exception in *Hicklin v. Orbeck* and *South-Central Timber*. Similar to Massachusetts in the present case, Alaska in *Hicklin* was attempting to use sales of its oil and gas resources to affect unrelated lines of business. The state's "Alaska Hire" statute mandated an Alaska-resident hiring preference for "all employment which is a result of" the sale of oil and gas resources. 437 U.S. at 529. This Court noted that the statute's effects "extend[ed] to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State." *Id.* at 530. This "attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources" violated the Privileges and Immunities Clause (*id.* at 531), and, as the Court later held, also constituted market regulation that would fall outside of the market-participant exception. *White*, 460 U.S. at 210-11. Similarly, in *South-Central Timber*, the Court struck down an Alaska requirement that timber taken from state lands be processed within the state. Alaska was not selling timber-processing services, and the plurality made clear that a state "may not impose conditions, whether by statute, regulation, *or contract*, that have a substantial regulatory effect outside of" the market in which a state is a participant. 467 U.S. at 97 (plurality op.) (emphasis added). Alaska was not "merely choosing its own trading partners," but was "attempting to govern the private, separate economic relationships of its trading partners." *Id.* at 99 (plurality op.). So too here.

Third, state action is proprietary only if it is "analog[ous] to the activity of a private purchaser." *New Energy Co.*, 486 U.S. at 278. It is regulatory if the state "is not functioning as a private purchaser of services." *Gould*, 475 U.S. at 289. The District of Columbia Circuit, in *Chamber of Commerce*, recently provided a detailed exposition of this rule: When a government actor makes an "economically rational" purchasing decision, it is acting as a "market participant," but when its actions are not those that a private purchaser of services would take, it is a "market regulator." In the latter circumstance, the government's "role as buyer is . . . a sham designed to conceal an effort to regulate."[41] The Commonwealth's *amici* themselves concede that the courts have inquired "whether the State is acting in the same way that a private party would act in contracting."[42]

While private contractors may sometimes decline to purchase goods and services produced in a particular country or under particular conditions because of human rights concerns (C.A. App. 413-14), it is undisputed in the record that the Massachusetts Burma Law's approach —declining to do business with companies that do business in a particular foreign country because of objections to that country's human rights record—is one that "would not be taken by *any* private contracting party." C.A. App. 32, ¶ 12 (emphasis added). Because no private party making economically rational purchasing decisions

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[41] 74 F.3d at 1336 (quoting *Associated Builders & Contractors v. Massachusetts Water Resources Auth.*, 935 F.2d 345, 366 (1st Cir. 1991) (*en banc*) (Breyer, C.J., dissenting), *rev'd*, 507 U.S. 218 (1993)).

[42] Br. *Amici Curiae* of Arkansas *et al.* at 14.

would adopt the Law's approach, it is a regulatory exercise undertaken in Massachusetts' "sovereign capacity," not its "proprietary capacity." *Camps Newfound/Owatonna*, 520 U.S. at 594.

Contrary to the contention of some of the Commonwealth's *amici*,[43] the market-participant exception does not apply just because regulatory activity of the same type might be lawful, or might be engaged in by private parties. This Court has observed that regulatory action "exists to a limited extent in the private sphere" and that "[p]rivate actors . . . may 'regulate' as they please, as long as their conduct does not violate the law" (*Building and Construction Trades Council*, 507 U.S. at 229), specifically singling out policy-driven boycotts as an example:

> A private actor . . . can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. . . . The private actor under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor.

Id. But a state can enjoy the market-participant exception only if it is acting as a "typical proprietor" and not as a regulator. The Burma Law is a quintessentially regulatory action that falls outside of any market-participant exception.

If applied at all, the market-participant exception should, at a minimum, be narrowly construed in the context of foreign commerce. While the market-participant exception is justified by "considerations of state sovereignty" (*Reeves*, 447 U.S. at 438), as the Court explained in *Japan Line*, "[i]t has never been suggested that Congress' power to regulate foreign commerce could be . . . limited" by "considerations of federalism or state sover-

[43] *See* Br. *Amici Curiae* of Arkansas *et al.* at 14; Br. *Amici Curiae* of Council of State Governments *et al.* at 13-14.

eignty." 441 U.S. at 449 n.13. Thus, the same foreign-relations concerns that drive the more "vigorous and searching scrutiny" of state action alleged to violate the Foreign Commerce Clause (*South-Central Timber*, 467 U.S. at 100) similarly counsel a more "vigorous and searching scrutiny" of any purported market-participant justification. The Burma Law cannot survive such scrutiny.

III. THE BURMA LAW IS PREEMPTED

As the Court of Appeals held, the Federal Burma Law and the Executive Order implementing it preempt the Massachusetts Burma Law. In fact, the Commonwealth does not seriously challenge the Court of Appeals' finding that the Law "veers from the carefully balanced path that Congress has constructed." Pet. App. 70a.

A. State Foreign-Affairs Laws Are Subject To Strict Scrutiny

Petitioners and some *amici* argue that the Court of Appeals erred by applying a presumption in favor of preemption of state laws, rather than a presumption against such preemption.[44] This argument is meritless. In *Hines v. Davidowitz*, this Court held that when concurrent federal and state legislation exists "in a field which affects international relations," any "concurrent state power that may exist is restricted to the narrowest of limits." 312 U.S. at 68. So too in *Boyle v. United Technologies Corp.*, this Court held that where a state law implicates a "uniquely federal interest," the "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." 487 U.S. 500, 507 (1988) (quotation omitted). Thus, where federal legislation "touch[es] on a field" like foreign relations, "in which the federal interest is . . . dominant[,] . . . the

[44] Pet. Br. 15-16; Br. *Amici Curiae* of Members of Congress Supporting Petitioners at 5-6.

federal system will be assumed to preclude state laws on the same subject." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *accord, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

Massachusetts admits, as it must (Pet. Br. 21), that its Law legislates "on the same subject" as the federal sanctions against Myanmar. Thus, the Federal Burma Law is "assumed to preclude" state laws such as the Massachusetts Law. Massachusetts cites *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), for the proposition that the Court "must look for special features warranting preemption." Pet. Br. 22. That proposition certainly is correct, and the very "special feature" that the *Hillborough County* Court gave as an example was "the dominance of the federal interest in foreign affairs." 471 U.S. at 719 (citing the "seminal case" of *Hines*). Where, as here, a state law impacts foreign affairs, the preemption inquiry is simply whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The Massachusetts Law in fact has that effect.

B. The Massachusetts Law Disrupts The Carefully Crafted Federal Balance

The Massachusetts Law would be preempted under any preemption standard. Massachusetts itself concedes (Pet. Br. 30-31) that there are "important" and "obvious differences" between the state and federal laws. Indeed, the Massachusetts Law is flatly inconsistent with the Federal Burma Law in at least five significant respects, as the Court of Appeals held. Pet. App. 70a-71a.

First, the Massachusetts Law "applies to virtually all investment in Burma," while the Federal Law "limit[s] only new investment in the 'development of resources.'" Pet. App. 70a; *see* OCCA §§ 570(b), (f)(2). Then-Assistant Secretary Larson described the more limited

scope of the Federal Law as "a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there." Larson, *supra*, at 3-4. Indeed, Congress specifically considered—but rejected—an amendment that would have prohibited all U.S. investment in Myanmar. S. 1092, 104th Cong., 1st Sess. (1995).

Second, the Massachusetts Law permits no trade with Burma, while "[t]he Federal Burma Law permits some trade with Burma." Pet. App. 70a-71a. The Federal Law does not prohibit companies that do business in Myanmar from contracting for goods, services, and technology. *See* OCCA § 570(f)(2). Congress viewed some continued economic ties to Myanmar as best facilitating democracy.[45]

Third, the Massachusetts Law "applies to parties, including foreign companies, not covered by the federal law." Pet. App. 71a; *compare* Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997) *with* MBL § 22G. Thus, the extraterritorial effects of the Massachusetts Law are far broader in scope than those of the Federal Law.

Fourth, the Massachusetts Law has no termination condition or provision, while "the federal law provides for sanctions to be terminated upon a finding by the President that human rights conditions in Burma have improved." Pet. App. 71a. The President—who has both expertise in and the responsibility of coordinating the Nation's foreign policy—"can weigh all the issues at stake at any given moment, take account of rapidly changing situations, and effectively tailor our response . . . in order best to advance our national interests." Larson, *supra*, at 2.

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[45] *See, e.g.*, 142 Cong. Rec. S8751 (daily ed. July 25, 1996) (Sen. Bond) ("U.S. firms are the ones on the ground who can help spread American values.").

The Massachusetts Law would remain in effect even if federal sanctions were eliminated.

Fifth, Massachusetts' "unilateral strategy toward Burma directly contradicts the Federal Law's encouragement of a multilateral strategy." Pet. App. 71a. Thus, under the Federal Law, the President must work with other countries to promote democracy in Myanmar. *Id.* The unilateral Massachusetts Law stands as an obstacle to the program carefully tailored by Congress.

Where Congress "in the exercise of its superior authority in th[e] field" of foreign relations has struck such a delicate balance, state legislation that "conflict[s] or interfere[s] with, curtail[s] or complement[s], the federal law" is preempted. *Hines*, 312 U.S. at 66; *accord Pink*, 315 U.S. at 233. This basic principle extends far beyond the foreign-affairs context. For example, in *Gade v. National Solid Wastes Management Ass'n*, state licensing acts designed to supplement federal OSHA standards were preempted. The Court held that states may not "selectively . . . 'supplement' certain federal regulations with ostensibly nonconflicting standards." 505 U.S. 88, 103 (1992).

Massachusetts' claim (Pet. Br. 21-22) that its Law and the Federal Law have a "shared goal" is simply irrelevant. "In determining whether state law 'stands as an obstacle' to the full implementation of a federal law, 'it is not enough to say that the ultimate goal of both federal and state law' is the same." *Gade*, 505 U.S. at 103 (citation omitted). Regardless of their "goals," where, as here, a state law "interferes with the methods by which the federal statute was designed to reach [its] goal," state law is preempted. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *accord Gould*, 475 U.S. at 86.[46]

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[46] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), cited by Massachusetts (Pet. Br. 22), is not to the contrary. In *CTS Corp*, the Court held that a state statute was not preempted not only because the state statute "further[ed] a basic purpose" of the federal statute, but also because the Court found "the alleged conflict illusory." *Id.* at 82, 84.

IV. CONGRESS HAS NOT APPROVED THE MASSACHUSETTS BURMA LAW

While Massachusetts' brief is less than clear on this point, it appears to suggest (Pet. Br. 17-21) that Congress somehow has "approved" the Burma Law and that the "approval" shields the Law, not only from preemption, but also from foreign-affairs and Foreign-Commerce-Clause scrutiny. There is a serious question whether federal approval could shield the law from a foreign-affairs challenge under any circumstances. In *DeCanas v. Bica*, the Court observed that if California's alien-employment statute had in fact been a "constitutionally proscribed regulation of immigration," Congress "would be powerless to authorize or approve [it]." 424 U.S. at 355-56. A leading commentator has likewise urged that "it seems clear . . . that Congress could not ratify a state's intrusion into foreign affairs." L. Tribe, *American Constitutional Law* § 6-35, at 1246 n.45 (3d ed. 2000) (citing *Zschernig*). But even assuming that Congress could approve the Law under both the foreign-affairs powers and its commerce powers, Congress has not in fact "approved" the Burma Law, implicitly or otherwise.

Massachusetts grasps at the Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809, as a purported source of explicit permission. But the URAA has no bearing whatsoever on the ability of a party to bring a constitutional challenge to a state law. By its terms, the URAA prohibits only private actions that claim a "State law . . . [is] invalid . . . [because it] is inconsistent with any of the Uruguay Round Agreements." 19 U.S.C. § 3512(b)(2)(A). As the Court of Appeals properly held (Pet. App. 25a-26a), the URAA

does not apply to this case: This suit does not allege that the Law violates the Uruguay Round Agreements.

Massachusetts, relying principally on *Barclays*, also argues that because Congress might have been aware of the Burma Law when it enacted federal sanctions against Myanmar, it has thereby conveyed "implicit . . . permission" for the Law. Pet. Br. 19-20. *Barclays* supports no such rule. In that case, the Court turned back a Foreign Commerce Clause "speak-with-one-voice" challenge to a nondiscriminatory California tax statute requiring worldwide combined reporting of income and expenses in part because Congress had thoroughly debated, but not enacted, numerous bills that would have eliminated the challenged state-taxation system. 512 U.S. at 325-26; *see also id.* at 326 nn.24-25. The Court concluded that "[g]iven these indicia of Congress' willingness to tolerate" the taxation scheme, there was no threat to Congress' ability to speak with "one voice." *Id.* at 37.

Importantly, *Barclays* reached the question of congressional permission only after it found the statute nondiscriminatory. *Id.* at 310-14. *Barclays* also confirmed that mere inferences from congressional inaction cannot save a state law, such as the Burma Law, that discriminates against foreign commerce. Rather, where a law is discriminatory, Congress must "convey its [permissive] intent with . . . *unmistakable clarity*." *Id.* at 323 (emphasis added).[47] Nor does *Barclays* hold that congressional silence can be read to permit actions, like the Burma Law, that regulate "out-of-state transactions in violation of the Commerce Clause." *Brown-Forman Distillers*, 476 U.S. at 582; *see supra* pp. 34-35. And nothing in *Barclays* remotely suggests that the states may intrude into

[47] *Accord New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982); *Maine v. Taylor*, 477 U.S. at 139.

the area of foreign affairs based on congressional silence —silence that may itself serve important foreign policy objectives.

Even if *Barclays*' holding were applicable in this case, no congressional approval of "unmistakable clarity" exists here, or is even suggested by Massachusetts. Even Massachusetts concedes that, at best, Congress might have been aware of the Burma Law when it enacted the federal sanctions. Pet. Br. 17. This is a far cry from the congressional actions described in *Barclays*—repeated and thorough debate of numerous bills aimed squarely at eliminating California's tax system. At best, there is parallel federal action here; but parallel federal action cannot save unconstitutional state statutes. In *South-Central Timber*, the Court held "the fact that . . . state policy . . . appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent . . . to authorize a similar state policy." 467 U.S. at 92. And, as shown in Part III above, the Massachusetts Law is not parallel, but, in fact, directly inconsistent with the federal act.

Massachusetts attempts to bolster its "implicit permission" theory by claiming (Pet. Br. 17-18) that Congress "consistently" fails to preempt state and local sanctions. This argument asks the Court to assume that 1980s-era state and local sanctions against South Africa were constitutional, and to reason from that premise that implied congressional approval is sufficient to sustain such laws. The premise is faulty because this Court never passed on whether these state and local sanctions were themselves constitutional. Even so, the congressional record on South Africa is quite different, involving two House resolutions (*see* H.R. Res. 548, 549, 99th Cong., 2d Sess. (1986)) and two congressional enactments supporting

state sanctions.[48] Of course, no similar action is present here.

Nor does the Export Administration Act's express preemption of all state "anti-Arab-boycott" laws aid Massachusetts. *See* 50 U.S.C. App. § 2407(c). The fact that Congress expressly preempted those state laws does not indicate that Congress believed that they were constitutional absent express preemption.

In sum, there is no basis whatsoever to assume that Congress somehow silently ratified a law that invades an exclusively federal realm, with discriminatory, burdensome, and extraterritorial effect, and that conflicts with the goals and means chosen by Congress to deal with the same problem.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

Of Counsel:
MICHAEL A. COLLORA
DAVID M. OSBORNE
DWYER & COLLORA
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 371-1000

TIMOTHY B. DYK
Counsel of Record
GREGORY A. CASTANIAS
JACK W. CAMPBELL IV
JOHN B. KENNEDY
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Respondent

February 14, 2000

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[48] *See* Br. *Amici Curiae* of Members of Congress Supporting Petitioners at 8.

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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

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ARGUMENT

I. THE MASSACHUSETTS BURMA LAW IS NOT PREEMPTED BY THE LATER FEDERAL STATUTE THAT, ACCORDING TO THE UNITED STATES, SHARES THE SAME "ULTIMATE END" AS THE STATE LAW.

A. The NFTC and *amici* argue that the Massachusetts Burma Law is preempted by federal statutes governing economic sanctions against Burma. NFTC Br. at 43-46; Br. *Amicus Curiae* of United States (U.S. Br.) at 30-35. The Court should reject this argument because the Massachusetts law does not conflict with the purposes or objectives of the federal law but rather shares its "ultimate end." U.S. Br. at 31.

The Court should first reject the broad rule of foreign-policy preemption urged by the NFTC. In an age of global procurement and trade, the Court should not apply a rule that presumes preemption or infers conflict from the complaints of foreign countries or mere differences between federal and state law. A "difference" between state and federal law merely "poses, rather than disposes" of the preemption question. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963). In cases concerning foreign affairs, even *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), recognizes that there may exist a "concurrent state power," albeit a power with a limited reach, and contrasts alien registration laws from state laws "bottomed on the same broad base as [the] power to tax." *Id.* Procurement laws are bottomed on a broad base -- the historic state power to spend tax dollars -- yet are narrow in their scope. They exercise a power of *self-*

government. They should not be held preempted absent a clear statement by Congress to that effect or hard evidence of an actual conflict between federal and state law. A clear statement of intent or hard evidence of conflict is required because the States -- and their congressional supporters -- are entitled to fair notice that proposed federal sanctions might implicitly preempt important rights of the States. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). There is no such notice of Congressional intent to preempt or evidence of actual conflict here.

B. The Massachusetts law does not "undermine[] the President's flexibility and discretion." U.S. Br. at 31. The President -- who issued his Executive Order many months after enactment of the Massachusetts law -- retains the full scope of his authority under the federal law concerning Burma and the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq*. The United States claims -- but does not show -- that the Massachusetts law "is in tension with Congress's purpose to assure that the President has extensive discretion. . . ." U.S. Br. at 32. In this as in other cases of claimed preemption, "Congress is free to find that local regulation does wreak . . . havoc and enact legislation for the purpose of preventing it." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 616 (1991). Congress has not done so here.

Nor does the allegation that the state law "discourages" private activity not prohibited by Congress show preemption. Many state laws impose restrictions on private activity that are different from federal restrictions. Each might be said to "discourage" the private activity or "upset" a "considered federal judgment" not to impose such restrictions. This is not sufficient evidence of conflict, however. *See id.*

There is also no conflict between the Massachusetts law and an alleged "multilateral" approach toward Burma. As

petitioners show in their opening brief, the United States has chosen to use both unilateral and multilateral tools to achieve reform in Burma. *See* Pet. Br. at 23; U.S. Br. at 4. The United States concedes that "the ultimate end sought by the United States and the State is the same: a free and democratic Burma that fully respects the human rights of its people." U.S. Br. at 31; *see also id.* at 2, 3; J.A. 74-75 (European Community's "objections" to Massachusetts law "pertain solely" to "breach" of trade obligations, not "share[d] US concerns about" Burma). The shared goal of state and federal law concerning Burma recalls the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086. That Act shows that Congress does not view state and local divestment and procurement laws as obstacles to unilateral federal or multilateral efforts to promote human rights in a foreign country. More recently, even the Members of Congress supporting the NFTC as *amici* in this Court candidly state that Congress is unlikely to preempt such state laws. Br. *Amici Curiae* of Memb. of Cong. Supporting Resp. at 27; *see also* NFTC Br. at 24. The court below discounted this history when it interpreted the "balance" allegedly struck by Congress in 1996. In fact, that balance likely included the judgments that Congress did not preempt state laws in 1986 and would not preempt similar laws ten years later. The "balance" described by the court below, the NFTC, and *amici* ignores these crucial indicators of legislative intent.

II. CONSTITUTIONAL TEXT AND HISTORY SUPPORT THE RIGHT OF A STATE TO BOYCOTT FIRMS THAT DO BUSINESS IN A COUNTRY THAT DENIES HUMAN RIGHTS.

A. The National Foreign Trade Council (NFTC) and several *amici* argue that the Massachusetts Burma Law "unconstitutionally infringes upon the federal government's exclusive foreign affairs power." NFTC Br. at 10-33; U.S. Br. at 35-38. Since the Framers intended "exclusive" federal *control* over foreign affairs, they argue, a state law is unconstitutional if -- in the view of the Judicial Branch -- the law "makes foreign policy" or "interferes" with federal control, even if the law does not conflict with a treaty, international agreement, or other federal law.

These arguments are more political than textual. The text and structure of the Constitution support the petitioners. The Constitution shows that the Framers expected that the States would have contact with foreign governments and citizens and sometimes provoke lawsuits or worse. U.S. Const. Art. I, § 10 (authorizing agreements between States and foreign countries and certain military actions with consent of Congress); Art. III, § 2 (federal jurisdiction to hear cases between States and foreign parties); Amendment XI (barring suits by "Citizens or Subjects of any Foreign State"). In an effort to block the most dangerous of state actions, the Constitution expressly denies to the States the power, *e.g.*, to engage in war, enter treaties, and levy duties on imports or exports. Art. I, § 10, cls. 1-3. These prohibitions were included despite the broad grants of power to the President and Congress under Articles I and II. *Compare*, *e.g.*, Art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties") and Art. I, § 8 ("The Congress shall have Power . . . To declare War") *with* Art. 1, § 10 (No State shall enter into any Treaty . . . [or] engage in War . . ."). If, as the NFTC argues, the affirmative grants of power to the federal government also enact a *per se*, implied prohibition on any state action adverse to a foreign country, there would have

been no reason to adopt many of the express prohibitions in Article I, § 10.

Other parts of the text similarly support the view that the Court should read any implied prohibition narrowly. As discussed below in Arg. I.B, the Constitution conferred on the federal government the means to control state action affecting foreign affairs through certain specified executive, legislative, and judicial actions. *See* Art. I, § 8 (Foreign Commerce Clause); Art. III, § 2 (judicial power to hear suits by foreign citizens and by United States); and Art. VI, § 2 (supremacy of federal laws, including treaties). Since these means are adequate to establish "uniformity" when the "national interest" so requires (*Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 331 (1994)), the Court should not expand any implied constitutional prohibition to encompass state and local boycotts.

Finally, the Tenth Amendment -- which is not cited by the NFTC or the United States -- also supports a narrow reading of any implied prohibition. The rule of constitutional construction embodied in the Tenth Amendment requires the Court to show caution in implying prohibitions on state action beyond those expressly stated in Article I. *See Alden v. Maine*, 119 S.Ct. 2240, 2259 (1999); *The Federalist* No. 32 at 198 (A. Hamilton) ("exercise of a concurrent jurisdiction" by the States not prohibited by implication even if it results in "occasional interferences in the policy of any branch of administration"); No. 45 at 292-93 (J. Madison) (C. Rossiter ed. 1961). For all of these reasons, the Court should read Articles I, II, and III in light of the Tenth Amendment and hold that the Constitution does not impliedly prohibit state and local boycotts concerning foreign affairs.

B. The NFTC and *amici* rely heavily on statements made at the time of the drafting and adoption of the Constitution.

See NFTC Br. at 11-19; U.S. Br. at 11-13. Neither the NFTC nor *amici*, however, cite a single statement by anyone present at the Constitutional Convention or state ratifying conventions, or writing at the time of the conventions, that the States were to be prohibited from boycotts. That silence is crucial in this case. The Framers and their critics had personal knowledge of the use of boycotts in aid of liberty. *See* Pet. Br. at 29; Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 28-30 (1999). If Articles I or II were understood to deny implicitly the right of the States to boycott, someone would have noticed.

The Convention did expressly address the question of state embargoes. Madison proposed to include them in the list of actions prohibited to the States. *See* 2 *The Records of Federal Convention of 1787*, at 440-41 (Max Farrand ed., 1911). Other delegates opposed the measure; one cited the need for "sudden embargoes during the war, to prevent exports, particularly in the case of a blockade[.]" Another said the provision was "unnecessary; the power of regulating trade between State & State, already vested in the Genl-- Legislature, being sufficient." *Id.*

Of course, the Framers generally discussed the need to confer on the federal government broad powers over foreign affairs. The Framers clearly intended to authorize the Federal Government to control the "power of any indiscreet member to embroil the Confederacy with foreign nations." *The Federalist* No. 42 (Madison) at 265. The existing problem addressed by the Framers, however, was not the absence of direct or implied prohibitions on state action in the Articles of Confederation. In fact, the Articles expressly prohibited the States, without the consent of Congress, from entering into agreements with foreign

nations, engaging in war, from keeping troops or ships of war in time of peace, and from issuing letters of marque and reprisal. U.S. Art. of Confed., art. VI. The Articles similarly prohibited the States from entering treaties or imposing certain tariffs. *Id.* The main problem addressed by the Framers was instead the more fundamental failures of the Articles: the fact that they "lacked an effective supremacy clause, executive, or judiciary, and Congress lacked adequate power to raise revenue or control the states in foreign relations." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1643 (1997). Without these features, the central government lacked the means to control state actions affecting military security, trade, and diplomacy.

The remedy enacted by the Constitution of 1787, however, was not to nullify all state actions adversely affecting foreign governments or citizens. Rather, the Framers controlled the States by (1) reenacting in Article I, § 10, the specific prohibitions on state action contained in the Articles of Confederation; (2) giving Congress and the new President broader foreign relations powers, including power under the Foreign Commerce Clause; and (3) creating a more powerful Supremacy Clause, enforceable by the Judicial Branch, to ensure compliance with enacted federal law, such as statutes and treaties. *See* Goldsmith at 1645. "Taken together, these mechanisms ensured state compliance with the political branches' foreign relations enactments. But they left the determination of when the national interest would be best served by the exclusion of state power largely to the discretion of the federal political branches." *Id.* They did not intend a broad, implied nullification of any state law deemed to be "foreign policy." *See* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L.

Rev. 341, 348 (1999). In fact, in the case of embargoes, taxes on exports, and tonnage duties, the delegates *debated* proposals for express prohibitions on these subjects because they did not believe that the general powers over foreign affairs granted to the federal government impliedly precluded state action of these types. *Id.* at 415 and nn. 258-264.

The categorical rule urged by the NFTC also contradicts the Framers' attempt to preserve state lawmaking as an essential part of the federal-state balance. *See The Federalist* No. 17 at 119 (A. Hamilton); No. 46 at 298 (J. Madison). The States were preserved in part to foster competition in public policy and to aid the federal government through state experimentation. *See Reeves v. Stake*, 447 U.S. 429, 441 (1980). The Framers also believed that, for federal power to be effectively cabined, the States must retain the confidence of their citizens. *See Printz v. United States*, 521 U.S. 898, 920 (1997). The bond between citizen and State will be frayed if a State is powerless to reflect its citizens' concern for human rights in a simple choice of vendors.

Recent state and local action concerning foreign affairs reflects the beneficial role of the States intended by the Framers. The course of legislation regarding South Africa in the 1980s shows the value of allowing States to inform federal policy by state action. Similarly, according to the court below, the Massachusetts Burma Law "may" have been a "catalyst for federal sanctions." Pet. App. 73. While the *amici* "Former United States Government Officials" decry the less- "informed judgments" of the States, their roster recalls still other trying times when private and state action foreshadowed a change in the foreign policy "preferred by federal officials." Br. of *Amici Curiae* Former United States Gov't Officials at 14.

Thus the historical evidence supporting federal *control* over foreign affairs does not render a state boycott concerning a

foreign country unconstitutional. Rather, the evidence shows that the Framers intended to ensure federal exclusivity in those cases when the political branches wished to establish national uniformity through a statute or treaty. *That* "exclusive" power is not threatened here. To the extent that the Court has inferred a broader, implied constitutional prohibition, it should decline to apply it to the boycott at issue.

III. APPLICATION OF THE MARKET PARTICIPANT DOCTRINE TO THE FOREIGN AFFAIRS POWER WOULD ESTABLISH A MANAGEABLE STANDARD FOR JUDICIAL REVIEW OF STATE LAWS AFFECTING FOREIGN AFFAIRS.

In support of their argument under the foreign affairs power, the NFTC and *amici* repeatedly cite *Zschernig v. Miller*, 389 U.S. 429 (1968). That case is unique: it represents the only time in our history that the Court has struck down a state law under the "dormant foreign affairs power." Pet. App. 30.

Zschernig did not address state spending powers but rather concerned the regulation of private inheritances. The court below stated that the "precise boundaries" of *Zschernig* "are not clear[,]" and "subsequent Supreme Court holdings have done little to clarify the reach of the Court's holding" in that case. Pet. App. 20, 30. No case of this Court addresses the intersection of foreign affairs, state spending, and international trade agreements.

There is accordingly little guidance for the interpretation of the terms and phrases used in *Zschernig*, such as "incidental or indirect" effect or "potential for embarrassment." The NFTC and *amici* have read these terms broadly to invalidate state and local selective purchasing laws, divestment laws, resolutions, and other

state laws adversely affecting foreign countries or firms. For example, the NFTC would strike any state law that is "an exercise in foreign affairs," even a resolution that supports United States foreign policy. NFTC Br. at 24; J.A. 232-33. *Amici* Associated Industries of Massachusetts, *et al.*, would strike any law "making a statement" about foreign affairs or even "disassociating" from them. *Amicus* Washington Legal Foundation would strike divestment laws and resolutions. The European Communities would ban "direct discussions" between the States and foreign countries, while reserving to themselves the right to continue to criticize state laws. *See* Br. *Amici Curiae* of European Communities at 5; J.A. 74.

The United States does not articulate a standard for judicial review but would permit resolutions and allow the States to cancel trade missions. *See* U.S. Br. at 28. The United States does not explain why a State may constitutionally decline to send its officials but not its tax dollars to a country that denies human rights. Regarding divestment laws, the United States says that there is "no occasion" to "consider" their "validity" (*id.* at 29), but it ignores the fact that core political speech underlies resolutions, divestment, and selective purchasing laws. Nor does the United States discuss the obvious fact that divestment concerns the purchase and sale of securities -- just as selective purchasing governs the purchase of goods and services. Each action involves state spending. Nor does the United States acknowledge that divestment laws -- no less than selective purchasing laws -- generally seek to influence change abroad. *See* 10 Op. Off. Legal Counsel 49, n. 2 (1986). Nor does the United States or the NFTC explain how a court reviewing divestment laws might judge the rate of investment or divestment or mere decisions to diversify. *See* Br. *Amici Curiae* of Memb. of Cong. Supporting. Pet. at 23 n.15 (quotation omitted). In

short, nothing in the briefs of the NFTC or the United States states a manageable judicial standard to determine which state actions affecting foreign countries are unconstitutional.

In contrast, the petitioners have described at least two classes of state laws that should be upheld as constitutional despite their relation to foreign affairs: (1) state laws that Congress has implicitly permitted, and (2) state laws that represent proprietary activity.

These standards should be adopted for three reasons. First, for the reasons stated in Arg. II, above, clear standards protecting certain state laws are consistent with the terms, structure, and history of the Constitution. The Court could sustain these laws while continuing to enforce the express prohibitions on state action in Article I and federal statutes and treaties through the Supremacy Clause. *See, e.g., United States v. Belmont*, 301 U.S. 324 (1937).

Second, the rules proposed by petitioners have been already applied by the Court and are workable. *See Barclays*, 512 U.S. at 320-31 (applying "implicit permission" test to claim under the "one voice" prong of review under the Foreign Commerce Clause); Pet. Br. at 25-36 (collecting cases on market participation doctrine).[1]

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[1] The NFTC and United States both ignore the fact that the Department of Justice in 1986 opined that the market participation doctrine applies to the dormant foreign affairs power. The United States in this case concedes that the doctrine applies to the Foreign Commerce Clause. U.S. Br. at 25. The Department of Justice in 1986 correctly stated that neither the dormant foreign commerce or foreign affairs power implies the displacement of state proprietary action. *See also* Br. *Amici Curiae* of States of North Dakota, *et al.* Cases involving a "direct restraint on state action" -- such as the Fourteenth Amendment

Third, the standards proposed by the petitioners would promote the separation of powers. In a case involving a state law, the Court has said that the "judiciary is not vested with power to decide how to balance a particular risk of retaliation [by foreign countries] against the sovereign right of the United States as a whole to let the States [act] as they please." *Barclays*, 512 U.S. at 328. According to the Members of Congress supporting the NFTC, "federal judges have little or no experience with foreign policy matters . . . and lack political accountability . . . ." Br. *Amici Curiae* of Memb. of Cong. Supporting Resp. at 24-25. By excluding two clear categories of state action from constitutional review, the Court would divert constitutional claims to the branches with greater expertise and accountability.[2]

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and the Privileges and Immunities Clause -- do not govern the question of market participation presented here. *See United Building & Constr. Trades v. Mayor and Council of City of Camden*, 465 U.S. 208, 220 (1984).

[2] Members of Congress supporting the NFTC turn *Barclays* on its head with their argument that a *per se* ban on state laws affecting foreign affairs, if declared by the Court, would "avoid the need for precise evaluations of foreign policy by federal judges." Br. at 26. The Members argue, in effect, that since judges are not competent to *adjudicate* questions about the validity of individual state laws, the Court should *legislate* a *per se* rule nullifying them all.

The same Members are too modest about the ability of Congress to legislate in the area. *See id.* at 27. Congress need not "make itself aware" of "thousands of state and local governments": it may legislate by type of state law, by country, or by other familiar means. *See, e.g.*, Export Administration Act

Congress has similarly limited the judicial role through federal acts endorsing recent international trade agreements. In federal statutes implementing the North American Free Trade Agreement (NAFTA) and General Agreements on Tariffs and Trade (GATT), Congress has recognized that the States have expanding roles in global procurement and trade and may be subject to foreign complaints. At the same time, however, Congress has expressly limited the role of the courts in cases brought under NAFTA and GATT, particularly private claims based on Congress's Commerce Clause authority. *See* Pet. Br. at 20; Br. *Amici Curiae* of Memb. of Cong. Supporting Pet. at 7-11.

Finally, by limiting the judicial role through clear standards protecting state authority, the Court would protect the power of the Executive. "Executive power is . . . improperly diminished when a court strikes down a state law on the basis of a foreign complaint that the President has determined to resist." Br. *Amicus Curiae* of United States, Arg. 1.a, *Barclays*, *supra* (Nos. 92-1384 and 92-1839). In order to protect the separation of powers and federalism, the Court should apply the clear standards urged by petitioners here.

IV. THE STATE BOYCOTT IS PROPRIETARY, NOT REGULATORY AND, IN ANY EVENT, SATISFIES THE FOREIGN COMMERCE CLAUSE.

A. Petitioners show in their opening brief that the Massachusetts law governing state procurement is proprietary and therefore unlike the regulation of private investment enacted by

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of 1979, 50 U.S.C. App. § 2407(c) (West 1991) .

Congress in 1996. *See* Pet. Br. at 25-36. In reply, the NFTC and the United States essentially argue the state law is regulatory because its purpose and effect "regulate" conduct beyond bidding and procurement in Massachusetts. "But, of course, this is not a 'reason' at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition." *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 102 n.* (1984) (Rehnquist, J., joined by O'Connor, J., dissenting).

The NFTC also exaggerates the importance of one purpose of the state law. As petitioners show in their opening brief, the Massachusetts law was enacted to disassociate Massachusetts from the denial of human rights in Burma. *See* J.A. 51-52. The fact that supporters of the law also stated their hope that state action might spur reform in Burma does not change the proprietary nature of procurement. For example, Massachusetts could have chosen to subsidize companies that do no business with Burma, while stating a similar wish to induce reform there. Or Massachusetts could have paid certain contractors to withdraw from existing state contracts, to the same end. In each case, the desire to improve conditions in Burma would not change the nature of these proprietary acts. When the selective purchasing law is viewed in this broader context, it is "unduly formalistic" to conclude that one stated purpose of the law dooms the "path chosen by the State as best suited to promote its concerns . . . ." *South-Central Timber Development, Inc.*, 467 U.S. at 103 (Rehnquist, J., dissenting).

Nor is there any merit to the claim that the extraterritorial *effects* of selective purchasing laws show their "regulatory" nature. Each of the state activities considered in the Court's previous cases concerning market participation plainly or likely

had upstream effects on firms and markets located outside the State. *See* U.S. Brief at 25. In both private and public settings, conditions imposed by major purchasers will often affect production and distribution by suppliers in other States and countries. This effect, however, does not change the proprietary nature of procurement. Furthermore, denying market participation status to selective purchasing on the ground of "extraterritorial effect" would threaten many other state and local procurement laws concerning the environment and labor conditions. *See* Br. *Amici Curiae* of Nonprofit Org. Supporting Pet. at 24-28. It would also threaten existing state and local laws that use state and local purchasing power expressly to influence other States' policies.[3]

Whatever its extraterritorial effects, procurement remains at bottom a choice to channel state resources to promote local values. "[W]hatever the state's ultimate goal, the state is approaching that goal by channeling its resources into commerce rather than placing restrictions on commerce already in existence." Laurence H. Tribe, *Constitutional Choices* (1985) at

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[3] Eleven States adjust their competitive bidding laws to benefit in-state businesses. *E.g.*, Ohio Rev. Code Ann. 125.11 (Anderson 1998) (Ohio contractors). Twenty-nine States have retaliated, applying a price preference for in-state products or firms only to the extent that an out-of-state low bidder's state applies a preference. *E.g.*, Fla. Stat. Ann. § 287.084 (West 2000 Supp.) Thus, twenty-nine States seek to influence other States' procurement policies through their own procurement codes. Similarly, several municipal governments joined in a boycott of Colorado in 1992 in protest over a proposed amendment to the State's constitution. *See* Gary Lee, *Mayors Join Boycott, Cancel Colorado Conference*, Wash. Post. Dec. 18, 1992, at A3.

145. "In procuring goods and services for the operation of government, a State may act without regard to the private marketplace and remove itself from the reach of the Commerce Clause." *Reeves*, 447 U.S. at 450 (Powell, J., dissenting). Extraterritorial effects -- if any -- of procurement laws do not change the fundamental nature of procurement.

Finally, the NFTC and *amici* err in applying an unreasonably narrow test to determine "market participation." If the Court compares the state law to private conduct, it should ask whether a private market participant *could* act in the way that the State has acted, not whether statistics would show that the average private person would necessarily act in that way, or actually has acted in that way. Here, private parties plainly could act as Massachusetts has acted. Private parties are conducting primary boycotts in droves. *See* Pet. Br. at 30 (collecting authorities); Br. *Amici Curiae* of Council of State Governments, *et al.* at 14. Private parties also can and do use secondary boycotts. From the non-importation boycotts of the 1700s to recent years, private persons have joined secondary boycotts that have subordinated their economic interests to higher ends. *See* Porterfield, *supra*, at 40 n. 259 (citations omitted); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 914-15 (1982) (alleged secondary boycotts protesting racial discrimination did not arise from "parochial economic interests"). Market participant status should not turn on whether the state has boycotted the Government of Burma, Burmese companies, or third parties doing business there.

B. Even if the Massachusetts law is not protected by the market participant doctrine, it should be upheld under the Foreign Commerce Clause. First, the Massachusetts law does not unconstitutionally discriminate against Foreign Commerce because it does not seek a local economic benefit and applies

equally to foreign and domestic firms. *See* Pet. Br. at 46-48. Second, any discrimination is justified by the legitimate state interest in disassociating from countries that deny human rights. As petitioners have explained, this interest is different from a State's interest in inducing reform abroad or expressing disapproval of foreign conduct. *See* Pet. Br. at 48-50; Br. *Amici Curiae* of Council of State Governments, *et al.* at 21-27; Br. *Amici Curiae* of New York City Comptroller, *et al.* at 10. As the court below recognized, the Massachusetts Burma Law was motivated in part by "Massachusetts' desire to eliminate moral taint that it claims it suffers from doing business with firms that do business in Burma . . . ." Pet. App. 47. Massachusetts has a legitimate interest in avoiding this moral taint. Its interest is local -- not "extraterritorial" -- because it concerns public funds raised and spent in Massachusetts for traditional state functions. *See* Mass. Gen. Laws Ann. ch. 7, § 22G (state agencies covered by law).

Nor can Massachusetts tailor its law more narrowly and still adequately serve its interest. The law applies only to state procurement. It must name Burma. It must apply to companies and their affiliates because state tax dollars might flow to Burma indirectly through financially connected firms. A hortatory resolution is not adequate to serve the state interest because State funds might continue to flow to the repressive regime. For these reasons, even if the market participant doctrine does not apply to the state law, it satisfies the Foreign Commerce Clause because "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988).

Third, the Court should reject the claim that the law "impairs the federal government's 'one voice' on foreign commerce matters." NFTC Br. at 35-36. This case shows the

danger inherent in using a metaphor as a legal standard. The NFTC, *amici*, and the court below all repeatedly use the phrase. None, however, cites an instance in which a state law has prevented the federal government from establishing a uniform voice when it wished to do so. If, after *Barclays*, the Court will strike state laws addressing certain issues because they "must be left to the federal government," *Container Corp.*, 463 U.S. 159, 194 (1983), it should nevertheless uphold selective purchasing laws. The federal statutes regarding South Africa in 1986 and Burma in 1996 show that Congress does not believe that boycotts of foreign countries "must be left to the federal government," but rather may also be imposed by the States.

V. THE COURT SHOULD REJECT THE MOST RECENT VIEW OF THE UNITED STATES AS *AMICUS CURIAE*.

The United States argues -- apparently for the first time in its history -- that state and local selective purchasing laws concerning a foreign country are unconstitutional. This view is not only unprecedented but also reverses the positions of the Department of Justice in 1986 and the Secretary of State in 1998.

In 1986, the Department of Justice issued an opinion upholding state and local divestment and selective purchasing laws against the same three claims made in this case. The Department opined that the market participation doctrine applies to both the Foreign Commerce Clause and the dormant foreign affairs powers. It accordingly stated its "belie[f]" that the United States should "not . . . file suit to invalidate these laws or file any *amicus* brief on behalf of those seeking to invalidate them." 10 Op. Off. of Legal Counsel 49 (1986).

In April, 1998, the Secretary of State told the National

Conference of State Legislatures that she and "President Clinton recognize the *authority* of state and local officials to determine their own investment and procurement policies, and the *right* -- indeed their responsibility -- to take moral considerations into account as they do so." Statement of April 17, 1998, J.A. 196 (emphasis added).

The United States now states that the 1986 opinion "no longer represents the position of the United States" (U.S. Br. at 29 n.23); its brief does not cite the 1998 statement of the Secretary of State at all. In light of these reversals, the Court should give no weight to the current brief of the United States. In similar circumstances, the Court has expressly declined to rely on "Executive statements" and "briefs filed" by the United States "criticizing" state action. *Barclays*, 512 U.S. at 328-330 and n. 32 (majority opinion) and 334 (O'Connor, J., concurring in part and dissenting in part). It should decline to do so again.

The views of the United States as *amicus curiae* deserve even less weight here, given its failure to act to avoid the constitutional questions. If the United States had credited the claims of Europe and Japan under GATT, it could have sued Massachusetts under the Uruguay Round Agreements Act of 1994 (URAA), P.L. 103-465, 108 Stat. 4809, 19 U.S.C. § 3512 (b)(2) and (c). It did not. Instead, it has pledged a vigorous defense of the same complaints and may soon resume that role. R. 425; Br. *Amici Curiae* of Eur. Comm. at 7 ("EU will begin new WTO proceedings" if the Court upholds state law). Alternatively, the Executive could have urged Congress to preempt certain state laws. It did not. Rather than exercise its own powers, the Executive has asked the *Judicial* Branch to strike state selective purchasing laws on *constitutional* grounds, thus inviting the Court to exercise the very power it disclaimed in *Barclays*, that is, "to evaluate whether the national interest is best

served" by the state law. *Id.* at 331. By declining to sue under the URRA, pledging a strong defense of the state law at the World Trade Organization, and failing to ask Congress to preempt state boycotts, all while encouraging the States to exercise their "authority" and "right" to boycott (J.A. 196), the United States has failed to exercise its executive powers, fueled a constitutional dispute, and miscast the Court as "the overseer of our Government." *Barclays*, 512 U.S. at 330.

In his concurring opinion in *Zschernig*, Justice Stewart stated his doubts about the relevance of the position of the United States expressed as an *amicus* supporting Oregon. "Resolution of so fundamental a constitutional issue," he wrote, "cannot vary from day to day with the shifting winds at the State Department." *Zschernig*, 389 U.S. at 443. The most recent gust from the Department of Justice vindicates this view.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment of the Court of Appeals for the First Circuit should be reversed.

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

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In the Supreme Court of the United States

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v.

NATIONAL FOREIGN TRADE COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BARBARA MCDOWELL
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
DOUGLAS HALLWARD-DRIEMEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID R. ANDREWS
Legal Adviser
Department of State
Washington, D.C. 20520

NEAL S. WOLIN
General Counsel
Department of the Treasury
Washington, D.C. 20220

ANDREW J. PINCUS
General Counsel
Department of Commerce
Washington, D.C. 20230

94-00

QUESTIONS PRESENTED

Whether a state procurement statute that seeks to effect political change in Burma by discriminating in the award of state contracts against foreign and domestic companies that do business in Burma and the affiliates of such companies (1) violates the Foreign Commerce Clause of the Constitution, (2) is preempted by the federal statutory scheme governing economic sanctions against Burma, or (3) impermissibly interferes with the national government's exclusive power over foreign affairs.

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INTEREST OF THE UNITED STATES

The United States has condemned, in the strongest possible terms, the Burmese government's violations of human rights.[1] The President and Congress have crafted a policy

[1] See, *e.g.*, President's Message to Congress Transmitting a 6-Month Periodic Report on the National Emergency with Respect to Burma 5 (Dec. 14, 1999) (reporting that the Burmese government "has continued to refuse to negotiate with pro-democracy forces and ethnic groups for a genuine political settlement to allow a return to the rule of law and respect for basic human rights"); Remarks by the President to the International Labor Organization Conference 4 (June 16, 1999) (condemning "the flagrant violation of human rights" in Burma); U.S. Dep't of State, 1 *Country Reports on Human Rights Practices for 1998: Report to the Senate Comm. on Foreign Relations and the House Comm. on International Relations* at xvii (1999) (Assistant Secretary of State Koh observes that the Burmese military junta in 1998 "continued its highly repressive policies, targeting all forms of dissent and intensifying its restrictions of free assembly and association"); *id.* at 813 (criticizing the Burmese government's "longstanding severe repression of human rights," including "extrajudicial killings and rape" by soldiers, "[a]rbitrary arrests and detentions for expression of dissenting political views," "forced unpaid

toward Burma that includes economic sanctions, restrictions on U.S. assistance, and coordinated international action to promote respect for human rights and the democratic process in that country. There is thus no disagreement between the United States and Massachusetts on the need for action to encourage reform in Burma. The disagreement is only over whether the State could permissibly take the sort of action reflected in the Massachusetts Burma Act.

The Constitution assigns to the national government the exclusive responsibility to direct the United States' relations with other countries. Accordingly, while States may speak out on matters of foreign policy, the ultimate authority to act on behalf of the United States, and each of its States, in the international arena resides with the President and Congress alone. The national government's ability to exercise that authority effectively, expeditiously, and flexibly may be undetermined when States pursue their own foreign-policy objectives in their own ways. That may be so even where, as here, a state or local government is pursuing an objective that is also being pursued by the national government.

The Massachusetts Burma Act, while consistent with United States foreign policy in its ultimate end, seeks to achieve that end by means that diverge from those chosen by the President and Congress. The Act imposes sanctions that are designed to discourage *all* foreign economic engagement with Burma, and that are applicable to *all* entities, both U.S. and foreign, that do business in Burma, including those whose only connection to Burma is through a parent, subsidiary, or affiliate. Because the Act discriminates against foreign commerce beyond what a State may do as a market participant, departs from the carefully crafted framework established by Congress and the President for imposing economic sanctions against Burma, and impermissibly intrudes into the national government's exclusive authority over foreign affairs, the United States has a substantial interest in this case.

STATEMENT

1. It is a principal objective of United States foreign policy to advance the cause of democracy and human rights throughout the world. The United States pursues that objective through a variety of means, including public statements by the President and other U.S. officials, private discussions with foreign leaders, targeted economic assistance, and the threatened or actual imposition of increasingly severe economic sanctions. In pursuing political reform in another country, the United States seeks, whenever possible, to act in concert with other members of the international community, both to maximize the pressure on that country and, with respect to sanctions, to minimize the damage to U.S. competitiveness and to distribute the economic burden equitably. See, *e.g.*, J.A. 107-108 (statement of then-Under

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civilian labor," and extensive "restrictions on basic rights of free speech, press, assembly, and association"); *Human Rights in Burma: Hearing Before the Subcomm. on International Operations and the Subcomm. on Asia and the Pacific of the House Comm. on International Relations*, 105th Cong., 2d Sess. 2 (1998) (*Human Rights in Burma*) (testimony of Acting Assistant Secretary of State Smith (Sept. 27, 1998)) ("The people of Burma continue to live under a highly repressive, authoritarian military government that is widely condemned for its serious human rights abuses."); Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, *Report on Labor Practices in Burma* 2 (1998) ("The Burmese military government has been widely criticized for human rights abuses," which include "arbitrary, extrajudicial and summary executions, torture, rape, arbitrary arrests and imprisonment, the imposition of forced labor on large sections of the population * * * , forced relocations and confiscation of property."); J.A. 134 (statement of Deputy Assistant Secretary of State Marchick) (noting Secretary of State Albright's expressions of "the United States outrage at egregious violations of human rights and international norms in * * * Burma"); *U.S. Policy Toward Burma: Hearing Before the Subcomm. on Foreign Operations of the Senate Comm. on Appropriations*, 104th Cong., 1st Sess. 2 (1995) (*U.S. Policy Toward Burma*) (testimony of Assistant Secretary of State Lord (July 24, 1995)) (discussing "[e]gregious human rights violations" in Burma).

Secretary of State (now Deputy Secretary of the Treasury) Eizenstat).

a. The general statutory framework for the President's imposition of economic sanctions against foreign governments is contained in the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (IEEPA). IEEPA authorizes the President to impose economic sanctions in response to "any unusual and extraordinary threat which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. 1701(a). IEEPA broadly defines the sorts of sanctions the President may impose; such sanctions are limited to transactions involving persons or property "subject to the jurisdiction of the United States." 50 U.S.C. 1702(a)(1).[2] Presidents have imposed economic sanctions under IEEPA against such nations as Iran (Exec. Order No. 12,170, 3 C.F.R. 487 (1980); see *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981)), South Africa (Exec. Order No. 12,532, 3 C.F.R. 181 (1986)), Libya (Exec. Order No. 12,543, 3 C.F.R. 181 (1987)), and Iraq (Exec. Order No. 12,724, 3 C.F.R. 297 (1991)). As discussed below, with respect to Burma, Congress supplemented IEEPA with a statute specifically directed at that country.

b. The United States has sought to effect change in Burma in three areas: democracy, human rights, and narcotics trafficking. The United States has pursued those objectives through both unilateral and multilateral action, in part because unilateral action alone would not be effective, given the limited economic relationship between the United States and Burma.

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[2] The President is required to consult with, and report to, Congress with respect to any exercise of his authority under IEEPA. 50 U.S.C. 1703. Congress may terminate any exercise of that authority. 50 U.S.C. 1706(b).

The United States' policy with respect to Burma is reflected in a statute and an executive order. See Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 to 3009-167 (Federal Burma Act); Exec. Order No. 13,047, 3 C.F.R. 202 (1998) (Burma Executive Order).[3] The Federal Burma Act, titled "Policy Toward Burma," (1) suspends all U.S. economic assistance to Burma with the exception of humanitarian assistance, "counter-narcotics" and "crop substitution" assistance, and assistance "promoting human rights and democratic values," (2) directs U.S. representatives to international financial institutions to oppose loans or other assistance to Burma, and (3) provides that no United States visa should be issued to "any Burmese government official," except as required by treaty or to staff the Burmese mission to the United Nations. Federal Burma Act § 570(a), 110 Stat. 3009-166. The Act also authorizes and directs the President to prohibit "new investment" in Burma by "United States persons" if he determines that the Burmese government has "committed large-scale repression of or violence against the Democratic opposition." § 570(b), 110 Stat. 3009-166. The Act specifically provides, however, that "new investment" does not include "the entry into, performance of, or financing a contract to sell or purchase goods, services, or technology." § 570(f)(2), 110 Stat. 3009-167. In addition, the Act directs the President to "seek to develop, in coordination with members of [the Association of South East Asian Nations] and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c), 110 Stat. 3009-166.

The sanctions prescribed under the Federal Burma Act must remain in effect until "the President determines and

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[3] The Federal Burma Act and the Burma Executive Order, together with IEEPA, are reproduced in the Appendix to this Brief.

certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government." Federal Burma Act § 570(a), 110 Stat. 3009-166. In the interim, the President is authorized to waive any of the sanctions, temporarily or permanently, "if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." § 570(e), 110 Stat. 3009-167.

c. In May 1997, President Clinton, pursuant to the Federal Burma Act and IEEPA, prohibited "new investment in Burma by United States persons." Burma Executive Order § 1. That prohibition, consistent with the definition of "new investment" in the Federal Burma Act, does not extend to "the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." *Id.* § 3. A "United States person" is defined as "any United States citizen, permanent resident alien, juridical person organized under the laws of the United States (including foreign branches), or any person in the United States." *Id.* § 4(c). See 31 C.F.R. Pt. 537 (1998) (Burmese Sanctions Regulations).[4]

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[4] The United States has taken other actions as well to press for reform in Burma. For example, the United States has implemented an arms embargo against Burma, suspended developing-country tariff preferences, downgraded U.S. representation in Burma from an ambassador to a charge d'affaires, worked to deny assistance to Burma from the International Monetary Fund, the World Bank, and the Asian Development Bank, sought strong resolutions concerning human rights in Burma at the United Nations General Assembly and the United Nations Commission on Human Rights, worked with the International Labor Organization to condemn the use of forced labor and lack of freedom of association for workers in Burma, and suspended the issuance of U.S. entry visas to high-level Burmese officials and their families. President Clinton, Secretary of State Albright, and other U.S. officials have repeatedly denounced the repressive practices of the Burmese regime. See, *e.g.*, Presidential Proclamation No. 6925, 3 C.F.R. 74 (1997) (suspending visas); *Human Rights in Burma* 8-9 (testimony of Acting Assistant Secretary of State Smith) (Sept. 27, 1998) (describing other U.S. actions with respect to Burma); *U.S. Policy Toward Burma* 3 (testimony of Assistant Secretary of State Lord) (July 24, 1995) (same).

2. a. In June 1996, several months before the Federal Burma Act was enacted, Massachusetts enacted a statute that restricts the ability of state agencies and state authorities to procure goods and services from entities that do business in Burma. Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M (West Supp. 1998) (Massachusetts Burma Act). During the debate in the Massachusetts House of Representatives, Representative Rushing, the principal sponsor of the Act, characterized the Act as "foreign policy" legislation with the "identifiable goal [of] free democratic elections in Burma." J.A. 39-40. During the subsequent debate in the State Senate, Senator Walsh, a sponsor of the Act, described the Act as an effort to use "tax dollars in Massachusetts" to "stop the violation of human rights" in Burma. J.A. 51.

The Massachusetts Burma Act requires the State to maintain a "restricted purchase list" identifying all entities "currently doing business with Burma," either directly or through a parent, subsidiary, or a subsidiary of a common parent. Massachusetts Burma Act §§ 22G, 22J. An entity is "doing business with Burma" if it is incorporated or headquartered in Burma, has operations, leases, franchises, or distribution agreements there, provides any goods or services to the Burmese government, or promotes the importation or sale of certain Burmese products. *Id.* § 22G. No state agency or state authority may purchase goods or services, other than medical supplies, from a company on the "restricted purchase list" unless there is no other bid or the company's bid is more than 10 percent lower than the lowest bid from an unlisted company. *Id.* §§ 22H, 22I.[5] If a state

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[5] Section 22H(e) contains an exception for companies whose only activity in Burma is providing medical supplies, reporting news, or supplying goods or services relating to international communications.

procurement officer should enter into a contract that is prohibited under the Act, the contract is deemed to be "void." *Id.* § 22L.

b. The restrictions under the Massachusetts Burma Act depart, in critical respects, from those under the Federal Burma Act and the Burma Executive Order. First, consistent with the Federal Burma Act's emphasis on developing "a coordinated, multilateral strategy" including Burma's major trading partners, the federal sanctions are limited to investment by "United States persons." Federal Burma Act § 570(a), 110 Stat. 3009-166. The state sanctions, in contrast, reach foreign persons as well. Second, the federal restrictions on investment are limited to "new investment," a term that does not encompass the continued operation of existing investment in Burma or the purchase or sale of goods or services. § 570(f)(2), 110 Stat. 3009-167. The state sanctions, in contrast, are not limited to new investment. Third, the federal sanctions terminate when "the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government." § 570(a), 110 Stat. 3009-166. The state sanctions contain no termination mechanism, much less one that may be activated by the President. Finally, the federal sanctions may be waived by the President in the interest of national security. § 570(e), 110 Stat. 3009-167. The state sanctions contain no waiver provision.

c. The Massachusetts Burma Act has generated protests from a number of U.S. allies and trading partners. For example, the European Union and Japan filed complaints against the United States in the World Trade Organization (WTO), contending that the Act violates certain provisions of the Agreement on Government Procurement.[6] See J.A. 88-

[6] H.R. Doc. No. 316, 103d Cong., 2d Sess. 1719 (1994) (Agreement on Government Procurement) (submitted to Congress in connection with

90, 91-92; see also Pet. App. 10 (noting that the Act "has generated protests from a number of this country's trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations"). The United States, working with Massachusetts, has responded to those claims in WTO dispute settlement proceedings.[7] Senior United States officials have acknowledged that the Act and the consequent protests from U.S. allies have been "an irritant" that has, among other things, "diverted the United States' and Europe's attention from focussing where it should be—on Burma." J.A. 166 (testimony of Deputy Assistant Secretary of State Marchick). The Act has thus

legislation implementing the Uruguay Round trade agreements). An annex to the Agreement lists Massachusetts among the "Sub-Central Government Entities which Procure in Accordance With the Provisions of this Agreement." *Id.* at 1991. In 1993, the Governor of Massachusetts expressed his understanding to the United States Trade Representative that Massachusetts would be required under the Agreement, when adopted, to award procurement contracts "on the basis of competitive procedures consistent with those specified in the [Agreement]" and "not [to] discriminate against suppliers, products, and services of foreign signatories to the [Agreement]." Letter from William F. Weld, Governor, Commonwealth of Massachusetts, to Michael Kantor, U.S. Trade Representative (Dec. 3, 1993).

[7] The United States participated in a series of WTO consultations with the European Union and Japan concerning the Massachusetts Burma Act. A WTO dispute settlement panel was subsequently established. Before any substantive arguments were presented to the panel, the proceedings were suspended, at the request of the European Union and Japan, in light of the district court's ruling in this case. See Letter of Ole Lundby, Chairman of the Panel, to Ambassadors from the European Union, Japan, and the United States (Feb. 10, 1999). Pursuant to Article 12.12 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the panel's authority automatically lapsed on February 10, 2000, one year after the proceedings were suspended. See Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1125, 1234 (1994). The European Union and Japan are not precluded from reinstituting WTO dispute settlement procedures challenging the Act in the future.

complicated the United States' efforts to develop a multilateral strategy toward Burma.

3. a. Respondent National Foreign Trade Council (NFTC), a trade association whose members include companies that have been effectively precluded by the Massachusetts Burma Act from doing business with the State, brought suit to challenge the Act. The district court held, on cross-motions for summary judgment, that the Act "unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs." Pet. App. 81. The court noted that the Act was designed "solely to sanction [Burma] for human rights violations and to change [Burma's] domestic policies" and has had a "disruptive impact on foreign relations," as reflected in the protests of the European Union, ASEAN, and Japan. *Id.* at 81-82.

b. The court of appeals affirmed. Pet. App. 1-73. Applying this Court's decision in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), the court first held that the Massachusetts Burma Act has "more than [the] incidental or indirect effect on foreign relations" that *Zschernig* suggested would be permissible. Pet. App. 23. The court noted that "the design and intent of the [Act] is to affect the affairs of a foreign country," that the Act "diverge[s] in at least five ways from the federal law, thus raising the prospect of embarrassment for the country," and that "the law has resulted in serious protests from other countries, ASEAN, and the European Union." *Ibid.*

The court of appeals further held that the Massachusetts Burma Act violates the Foreign Commerce Clause by discriminating against commerce with Burma and undermining national uniformity in the regulation of foreign commerce. Pet. App. 52-55. The court rejected the State's contention that the Foreign Commerce Clause was not implicated because the State was merely acting as a "market participant." The court reasoned that the State had "crossed over the line from market participant to market regulator" by imposing

on its suppliers "conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts." *Id.* at 44-45.

Finally, the court of appeals held that the Massachusetts Burma Act is preempted by the Federal Burma Act. Pet. App. 60-73. The court observed that the standard for finding preemption is less stringent where a State legislates in an area committed to exclusive federal authority rather than in an area of concurrent federal and state authority. *Id.* at 64-70. The court concluded that the Act, which "risks upsetting Congress's careful choice of tools and strategy" for achieving political reform in Burma, impermissibly conflicts with federal law. *Id.* at 71.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly emphasized that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979) (quoting *Board of Trustees* v. *United States*, 289 U.S. 48, 59 (1933)); see also, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government * * * is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-322 (1936).

The national government's preeminent role in acting for the United States in the international arena is reflected in several of the Constitution's express grants of power to Congress in Article I, Section 8,[8] and to the President in

[8] Those include Congress's powers to "provide for the common Defence * * * of the United States," "regulate Commerce with foreign

Article II, Sections 2 and 3,[9] and in several of its express restrictions on state power in Article I, Section 10.[10] The most significant of those enumerated powers, for present purposes, is Congress's power "[t]o regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, Cl. 3.

The Framers understood that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist No. 42*, at 264 (James Madison) (quoted in *Hines*, 312 U.S. at 63 n.11). Under the Articles of Confederation, the national government's efforts to engage in political and commercial relations with other countries had been undermined by the States.[11] There was even concern that the United States could not prevent a State from embroiling the nation in a war with another country. As Edmund Randolph of Virginia observed at the Constitutional Convention, "particular states might by their conduct provoke war without controul" because, "[i]f a State acts against a foreign power contrary to the laws of nations or violates a treaty," the national government "cannot punish that State, or compel its obedience to the treaty." 1 *The Records of the Federal Convention of 1787*, at 19, 24-25 (M. Farrand ed. 1966).

That instability and inconsistency caused the Framers to propose a Constitution that provided for a single national voice over foreign political and commercial affairs. Proponents of the Constitution perceived that single voice as essential to preserving "[t]he peace of the whole." *The Federalist No. 80*, at 476 (Alexander Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."); see also *The Federalist No. 3*, at 43 (John Jay) (asserting that adherence to the law of nations "will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies"); *The Federalist No. 44*, at 281 (James Madison) (recognizing "the advantage of uniformity in all points which relate to foreign powers"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 228-229 (1824) (Johnson, J., concurring).

The Framers' decision to vest responsibility for foreign commercial and political affairs "in the national government exclusively," *Pink*, 315 U.S. at 233, has several implications for state laws such as the one at issue here.

First, a state law violates the dormant Foreign Commerce Clause if it discriminates against foreign commerce (including against commerce with a particular nation), thereby inviting retaliation against the entire United States, or prevents the United States from speaking with one voice with respect to foreign commerce. Although, in our view, the market-participant exception recognized under the dormant

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Nations * * * and with the Indian Tribes," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, Cls. 1, 3, 10, 11.

[9] Those include the President's powers to serve as "Commander in Chief of the Army and Navy of the United States," "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate, and "receive Ambassadors." U.S. Const. Art. II, §§ 2, 3.

[10] Those include restrictions on the States' "enter[ing] into any Treaty, Alliance, or Confederation," "grant[ing] Letters of Marque and Reprisal," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement or Compact * * * with a foreign Power," and "engag[ing] in War." U.S. Const. Art. I, § 10.

[11] For example, several States, in contravention of the Treaty of Paris ending the War of Independence, acted to prevent British merchants from collecting their pre-War debts. And, when Britain refused to permit American trade in the West Indies, the conflicting positions of the States precluded a coordinated national response. See Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 342-352 (1979); *Oldfield* v. *Marriott*, 51 U.S. (10 How.) 146, 163-165 (1850).

Interstate Commerce Clause extends at least in some measure to foreign commerce as well, that exception does not permit a State to do what Massachusetts has done here—*i.e.*, use its spending power as a means of regulating conduct beyond the Nation's borders and beyond the particular transactions in which the State is involved.

Second, quite aside from the limitations imposed by the Foreign Commerce Clause of its own force, when a state law addresses concerns of foreign policy and foreign commerce that are also addressed by a federal law, the Supremacy Clause is implicated more strongly than it is in the purely domestic context. Thus, the state law will more readily be found to be preempted as "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. Here, the Massachusetts Burma Act stands as such an obstacle to the effectuation of the United States' multifaceted and multilateral strategy toward Burma, as reflected in the International Emergency Economic Powers Act, the Federal Burma Act, and the Burma Executive Order.

Third, even absent preemption by an Act of Congress or an order of the President, a state law will be struck down if it has "a direct impact upon foreign relations," rather than a mere "incidental or indirect" one. *Zschernig* v. *Miller*, 389 U.S. 429, 434, 441 (1968). For the reasons stated above, the Massachusetts Burma Act is invalid on that ground as well.

ARGUMENT

I. THE MASSACHUSETTS BURMA ACT VIOLATES THE FOREIGN COMMERCE CLAUSE

The Commerce Clause "has long been understood * * * to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 310 (1994) (quoting *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)). Because "the Founders intended the scope of

[Congress's] foreign commerce power to be * * * greater" than its power over interstate commerce, the Court has applied heightened scrutiny when "ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations.'" *Japan Line*, 441 U.S. at 448-449. Accordingly, a state law may violate the Foreign Commerce Clause, even in the absence of a superseding federal law, if the state law *either* discriminates against foreign commerce, *Barclays*, 512 U.S. at 311, 312-314, *or* "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments,'" *Japan Line*, 441 U.S. at 451 (quoting *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976)).[12] The Massachusetts Burma Act suffers from both infirmities. The Act therefore violates the Foreign Commerce Clause unless it can be saved on the theory that the State is acting as a market participant in penalizing companies that do business in Burma. As we show in Point C, *infra*, however, the Act cannot be sustained on that theory.[13]

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[12] A state tax must satisfy additional criteria in order to survive a challenge under the Foreign or Interstate Commerce Clause. See *Barclays*, 512 U.S. at 310-311 (citing *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)). Questions concerning the validity of state taxes are not presented here. Nor is there any occasion in this case to consider the application of the Foreign Commerce Clause to state measures that do not facially discriminate against foreign commerce or prevent the Nation from speaking with one voice, but nevertheless are claimed to impermissibly burden foreign commerce. Cf. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-354 (1977) (invalidating a "facial[ly] neutral[]" state statute as imposing an undue burden on interstate commerce).

[13] As we have pointed out above (see pp. 11-12 & n.8, *supra*), the Foreign Commerce Clause is one of the explicit provisions manifesting the Constitution's grant of authority to the national government over foreign affairs generally. In *Zschernig*, the Court relied on that general foreign affairs power to invalidate a state inheritance statute that required determinations regarding the conduct of foreign governments. We explain in

A. The Massachusetts Act Discriminates Against Foreign Commerce

The Massachusetts Burma Act facially discriminates against commerce with Burma. The Act penalizes all companies that engage in commerce with Burma, whether directly or through a corporate parent, affiliate, or subsidiary, by effectively foreclosing procurement opportunities with the State.[14] Companies are forced to choose between doing business in Burma and doing business with Massachusetts. Such discrimination is not merely an incidental consequence of the Act. It is the very means that the State has selected to pursue its foreign-policy objectives with respect to Burma. See, *e.g.*, pp. 7-8, *supra*, and pp. 36-37, *infra*.

Contrary to Massachusetts' assertion (Br. 47), a state statute that facially discriminates against interstate or foreign commerce violates the Commerce Clause, even if the statute was not "intend[ed] to secure economic advantages for local businesses at the expense of businesses situated elsewhere." In *Kraft General Foods* v. *Iowa Department of Revenue*, 505 U.S. 71, 78 (1992), this Court rejected a State's

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Section III of this Brief that the Massachusetts Burma Act also is unconstitutional because it impermissibly intrudes into the conduct of foreign affairs by the President and Congress. That is so, however, for essentially the same reasons that the Act is inconsistent with the Foreign Commerce Clause. We have elected to address the Foreign Commerce Clause first because this case, unlike *Zschernig*, involves foreign commerce. In our view, it would be appropriate for the Court to rest its decision on the Clause of the Constitution that is specifically applicable to the subject matter, rather than on the national government's more general power over foreign affairs, of which the Foreign Commerce Clause is but one (albeit significant) exemplification. We will not repeat in detail in Section III all of the ways in which the Massachusetts Burma Act intrudes upon the powers of the national government.

[14] For example, Massachusetts would be required to discriminate against a Pennsylvania company that sells office products solely because the company is owned by a French conglomerate that also owns a Japanese company that sells food products in Burma.

analogous argument that its tax system, which treated dividends received from foreign subsidiaries less favorably than dividends received from domestic subsidiaries, did not violate the Foreign Commerce Clause because "it [did] not favor local interests." The Court explained that a state statute that discriminates against foreign commerce "is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination." *Id.* at 79. "As the absence of local benefit does not eliminate the international implications of the discrimination," the Court said, "it cannot exempt such discrimination from Commerce Clause prohibitions." *Ibid.*

Nor is the Massachusetts Burma Act rendered permissible, as Massachusetts contends (Br. 47), by the fact that the Act applies to domestic, as well as foreign, companies that do business in Burma. A statute may violate the Foreign Commerce Clause by discriminating against foreign *commerce* (*e.g.*, commerce with a particular foreign nation) as well as by discriminating against foreign *persons*.[15]

That conclusion is compelled by the text of the Foreign Commerce Clause, which refers to commerce "with foreign *Nations*," and by its principal purpose, which was to prevent individual States from embroiling this Nation in disputes with other nations, thereby inviting retaliation that would harm the United States as a whole. See pp. 12-13, *supra*; see also *Kraft Gen. Foods*, 505 U.S. at 79; *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 317 (1851) (one of the purposes of the Commerce Clause was to eliminate state laws

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[15] Cf. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 575-583 (1997) (a state property tax violated the Interstate Commerce Clause by discriminating between domestic charitable organizations operated principally for the benefit of state residents and domestic charitable organizations operated principally for the benefit of non-residents).

that create "discriminations favorable or adverse to commerce with particular foreign nations").[16]

B. The Massachusetts Act Prevents The United States From Speaking With One Voice On Foreign Commerce

The Massachusetts Burma Act violates the Foreign Commerce Clause for an additional, independent reason: It prevents the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Japan Line*, 441 U.S. at 449; accord *Barclays*, 512 U.S. at 320. The Court has explained that a state statute "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 194 (1983). The Massachusetts Burma Act not only "implicates foreign policy issues"—whether economic sanctions should be used to press for political reform in Burma and, if so, the nature, extent, and duration of those sanctions—but does so through an approach that departs, in significant respects, from the approach chosen by the national government.[17]

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[16] Because the Massachusetts Burma Act facially discriminates against a species of foreign commerce (*i.e.*, commerce with Burma), the Act is unlike the California tax statute that was held to be nondiscriminatory in *Barclays*. The California statute, which prescribed the use of the "worldwide combined reporting" method by multinational corporations, applied the same method to domestic and foreign corporations. *Barclays*, 512 U.S. at 310-311. Indeed, the only claim of discrimination in that case was that the costs of complying with the statute would be higher for foreign corporations than for domestic corporations (*e.g.*, because domestic corporations "already keep most of their records in English, in United States currency, and in accord with United States accounting principles"). *Id.* at 313. The Court concluded that "[t]he factual predicate of [that] discrimination claim, however, is infirm." *Ibid.*

[17] Because Congress and the President have spoken for the United States with respect to sanctions against Burma, there is no occasion to consider the application of the "one voice" aspect of the dormant Foreign Commerce Clause to state purchasing restrictions where the national government has not spoken.

As explained more extensively below (at 31-35), although the national government and the State seek the same end with respect to democratic reform in Burma, they have chosen to do so through different means.[18] The national government has chosen a carefully calibrated strategy of penalties and incentives, which are capable of being applied flexibly by the President in response to the Burmese regime's conduct, the actions of the international community, and other national security considerations. The national government has elected not to penalize U.S. companies with existing investments in Burma or to prohibit "the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." Federal Burma Act § 570(f)(2), 110 Stat. 3009-167. The national government has also recognized that the most effective means to achieve reform in Burma is through "a comprehensive, multilateral strategy" that involves those nations, primarily in Asia, that have stronger economic ties to Burma than has the United States. § 570(c), 110 Stat. 3009-166.

The State's approach is inconsistent with the national government's approach in a number of respects. First, the Massachusetts Burma Act undermines the President's flexibility

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[18] The Massachusetts Burma Act prevents the United States from "speaking with one voice" with respect to foreign commerce for essentially the same reasons that, as set forth in Sections II and III, *infra*, the Act is preempted by the federal statutory scheme governing economic sanctions against Burma (see pp. 30-35, *infra*) and interferes with the national government's exclusive authority over foreign affairs (see pp. 35-38, *infra*). As explained in this Section, whether or not the Massachusetts Burma Act is actually preempted by the Federal Burma Act and the Burma Executive Order, the Act prevents the United States from speaking with one voice with respect to the regulation of commerce with Burma (and therefore violates the Foreign Commerce Clause) because the different federal strategy embodied in the Federal Burma Act and the Burma Executive Order *is* the one voice of the United States on the subject.

in dealing with the Burmese regime. Whereas the sanctions under the Federal Burma Act and the Burma Executive Order may be adjusted in response to changing circumstances, the sanctions under the Massachusetts Burma Act are applied inflexibly. See pp. 31-33, *infra*. Second, the Massachusetts Burma Act seeks to discourage all business by U.S. companies in Burma, contrary to Congress's and the President's decision that only "new investment" is to be prohibited. See pp. 33-34, *infra*. Third, the Massachusetts Burma Act operates against foreign companies as well as U.S. companies, which has antagonized U.S. allies and complicated the development of a multilateral strategy toward Burma. See pp. 34-35, *infra*. Clearly, then, the Act undermines the United States' ability to "speak with one voice."

Indeed, if the Massachusetts Burma Act were sustained, a multitude of different, and differing, state and local measures sanctioning foreign governments could be expected. At least 18 local governments have adopted similar, although not necessarily identical, selective-purchasing statutes directed at Burma. J.A. 155-156. And various state and local governments have adopted or considered similar selective-purchasing statutes aimed at other countries, including China, Cuba, Egypt, Indonesia, Iran, Iraq, Laos, Morocco, Nigeria, North Korea, Pakistan, Saudi Arabia, Sudan, Switzerland, Tibet, Turkey, and Vietnam. J.A. 144-156. Cf. *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984) (in determining whether a state tax discriminates against interstate commerce, the Court inquires whether the tax is "such that, if applied by every jurisdiction, there would be no impermissible interference with free trade") (internal quotation marks omitted).[19]

[19] Massachusetts suggests (Br. 19) that Congress has acquiesced in the Massachusetts Burma Act by declining to preempt it. In *Barclays*, the Court explained that Congress's acquiescence in a state statute that discriminates against foreign commerce must appear with "unmistakable clarity," whereas Congress's acquiescence in a state statute that undermines the United States' ability to "speak with one voice" on foreign commerce need not be as explicit. 512 U.S. at 323. The Court applied only the latter standard in *Barclays* because the California tax statute at issue there, unlike the Massachusetts Burma Act, did not discriminate against foreign commerce. Moreover, this case does not present the sort of evidence of congressional acquiescence in a state statute that the Court deemed sufficient in *Barclays*. Whereas Congress repeatedly declined to enact legislation that would have precluded the taxing method used by California (see *Barclays*, 512 U.S. at 325-328), Congress has not considered and rejected legislation to preclude state laws such as the Massachusetts Burma Act, and that Act is in significant tension with the strategy adopted by Congress and the President for bringing about reform in Burma.

C. The Massachusetts Act Is Not Saved On The Theory That The State Is Acting Simply As A Market Participant

The State contends that the Massachusetts Burma Act does not violate the Foreign Commerce Clause—whether or not the Act discriminates against foreign commerce or undermines national uniformity—because the State is acting as a "market participant" in refusing to deal with companies that do business in Burma. The Massachusetts Burma Act cannot be sustained on that theory.[20]

[20] This case presents no question concerning the interpretation of federal statutes governing the President's authority in prescribing the terms for procurement by federal agencies. See Federal Property and Administrative Services Act, 40 U.S.C. 486(a) (authorizing the President to "prescribe such policies and directives * * * as he shall deem necessary to effectuate the provisions of [this] Act"); see also *AFL-CIO* v. *Kahn*, 618 F.2d 784, 789 (D.C. Cir.) (en banc) (noting that the Act "grants the President particularly direct and broad-ranging authority" over federal procurement), cert. denied, 443 U.S. 915 (1979); *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159, 170 (3d Cir.) (noting the Act's "broad grant of procurement authority" to the President), cert. denied, 404 U.S. 854 (1971); cf. *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1333-1339 (D.C. Cir. 1996).

1. This Court has identified a "narrow exception to the dormant [Interstate] Commerce Clause for States in their role as 'market participants.'" *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 589 (1997). The Court has not yet decided whether, or to what extent, the market-participant exception applies to foreign commerce. See *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.9 (1980) ("We have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause * * * . We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."). It is significant, however, that even in the purely domestic context, the Court has never extended the market-participant exception to state action analogous to that at issue here, *e.g.*, to a state procurement statute that discriminates against companies that do business in another State in order to influence that other State's internal policies.

The market-participant exception originated in two cases in which the State, as a participant in a commercial activity, preferred its own citizens over citizens of other States. In *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Court held that a State, in paying a "bounty" to encourage the processing of abandoned automobiles into scrap metal, could prefer local processors over out-of-state processors. The Court reasoned that the State was not seeking to regulate the market for abandoned automobiles; "[i]nstead, it ha[d] entered into the market itself to bid up their price." *Id.* at 806. The Court then concluded that the Commerce Clause does not "prohibit[] a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. Similarly, in *Reeves*, the Court held that a State, as the operator of a cement plant, could choose to sell the cement only to its own citizens. 447 U.S. at 440-447.

The Court's subsequent decisions make clear that the market-participant exception does not exempt all of a State's

procurement decisions from the constraints of the Commerce Clause. In *White* v. *Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983), the Court upheld an executive order issued by the Mayor of Boston that required that city residents constitute 50 percent of the workforce on public construction projects funded wholly with city funds. The Court reasoned that such a preference for city residents did not violate the Commerce Clause because, "[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant." *Id.* at 214-215. The Court acknowledged that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." *Id.* at 211 n.7. The Court found it "unnecessary in this case to define those limits with precision," however, because "[e]veryone affected by the order is, in a substantial if informal sense, working for the city." *Ibid.* Thus, in *White*, the Court again sustained a procurement provision that simply preferred the city's (and thus the State's) own residents in the expenditure of the city's own funds on the city's own construction projects. The city did not broadly make employment on city-funded construction projects open to residents and non-residents alike but then disqualify residents of a particular State based, for example, on the city's disapproval of the policies of that State. Nor did the city seek to influence the contractors' actions aside from their work for the city itself.

The Court addressed some of the limits on the market-participant exception in *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986), which concerned a Wisconsin statute that barred the State from doing business with companies that had committed multiple violations of the National Labor Relations Act (NLRA). The State did not dispute that, if the statute was "regulatory" in nature, the statute would be preempted

under *San Diego Building & Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The Court rejected the State's argument that the statute "escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power," which the Court found to be "a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA." *Gould*, 475 U.S. at 287. In other words, given that "the point of the statute is to deter labor law violations," *ibid.*, the statute was regulatory, although the statute involved the exercise of the State's spending power. The Court also rejected the State's related argument that it was merely acting as a market participant in refusing to deal with companies that violated the labor laws. The Court observed that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin simply is not functioning as a private purchaser of services; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289 (internal quotation marks and citation omitted). The Court has since explained its holding in *Gould* on the ground that the state statute in that case "addressed employer conduct unrelated to the employer's performance of contractual obligations to the State" for the purpose of "deter[ring] NLRA violations." *Building & Constr. Trades Council* v. *Associated Builders*, 507 U.S. 218, 228-229 (1993).

Similarly, in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), a plurality of the Court concluded that Alaska was not acting as a market participant in requiring those who purchased timber on state lands to have the timber processed within the State. *Id.* at 93-99 (plurality opinion of Justice White). The plurality observed that the market-participant doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. The plurality concluded that the

market-participant exception was inapplicable because "the State [was] attempting to govern the private, separate economic relationships of its trading partners" in a market in which the State was not a participant. *Id.* at 99.

2. We do not disagree with the State's submission that the market-participant exception applies, at least to some extent, to foreign as well as domestic commerce. For example, South Dakota, in selling cement from its cement plant, could prefer its own citizens not only over a would-be purchaser from Wyoming, as in *Reeves*, but also over a would-be purchaser from Canada, in the absence of a federal statute or treaty providing otherwise. And the preferences in *Hughes* and *White* for local residents could have been enforced against residents of other countries as they were against residents of other States absent a contrary federal statute or treaty.[21]

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[21] This Court has reserved the question whether "Buy American" statutes, which give a preference in a State's purchases to goods produced in the United States over goods produced in other countries, violate the Commerce Clause. See *Reeves*, 447 U.S. at 437 n.9. The lower courts have divided on the question. Compare *Trojan Techs., Inc.* v. *Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (sustaining Buy American statute), cert. denied, 501 U.S. 1212 (1991), and *K.S.B. Tech. Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 776 (N.J. 1977) (same), with *Bethlehem Steel Corp.* v. *Board of Comm'rs*, 80 Cal. Rptr. 800, 803 (Ct. App. 1969) (invalidating Buy American statute). A Buy American statute differs from the state actions at issue in *Reeves*, *Hughes*, and *White*, because the State is not simply preserving the benefits of its expenditures for its own citizens as against everyone else, domestic and foreign alike. The State is singling out suppliers of imported goods for disfavored treatment. In contrast to the Massachusetts Burma Act, however, a Buy American statute does not single out particular foreign governments for disfavored treatment, seek to affect the internal policies of a foreign government, or penalize companies merely because they do business in a particular country. In considering the validity of such Buy American statutes as applied to goods from particular countries, the Agreement on Government Procurement (see note 6, *supra*) now would have to be consulted.

There is no occasion in this case, however, to consider the precise limits of the market-participant exception in the context of foreign commerce. Whatever those limits might be, the Massachusetts Burma Act exceeds them. The Commerce Clause confers on Congress, not the States, the power to "regulate" commerce "with foreign Nations, and among the several States." Accordingly, an exercise of a State's procurement power falls outside the market-participant exception whenever it is "regulatory" in nature.

Here, several characteristics of the Massachusetts Burma Act make clear that the Act, like the state statutes in *Gould* and *South-Central Timber*, is properly regarded as regulatory in nature. First, in contrast to the state action that this Court has held to come within the market-participant exception, the Massachusetts Burma Act does not seek to advance the economic interest of the State or its own citizens through the State's participation in the marketplace. Second, the "point of the statute," *Gould*, 475 U.S. at 287, is to deter U.S. and foreign companies from doing business in Burma, and thereby to pressure the Burmese regime for political reform. The Act thus "address[es] [such companies'] conduct unrelated to [their] performance of contractual obligations to the State." *Associated Builders*, 507 U.S. at 228-229; accord *South-Central Timber*, 467 U.S. at 97 (plurality opinion) ("The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further."). Third, as reflected in the Act's design, operation, and scope, the Act seeks to affect the conduct not only of the State's own contracting partners, but also of third parties—and, indeed, the conduct of those third parties outside the United States. Because the Act penalizes companies that do not themselves do business in Burma, but that merely have a parent, a subsidiary, or an affiliate that does business in Burma, the Act regulates conduct even further from a company's own "contractual obligations to the State" than did

the statutes in *Gould* and *South-Central Timber*. And the Act ultimately seeks, of course, to affect the conduct of Burmese officials.[22]

The conclusion that the Massachusetts Burma Act falls outside the market-participant exception is especially evident when the analogous question is considered in the context of commerce among the States. If Massachusetts refused to do business with any companies that do business in Texas, or their parents, subsidiaries, or affiliates, in order to induce a change in the internal policies of Texas, there could be little doubt that Massachusetts would violate the Commerce Clause. Such a boycott is no more consonant with that Clause when a State targets another country rather than another State. The Interstate Commerce Clause was intended to prevent "economic Balkanization" and retaliation by one State against another, see *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179-180 (1995), and the Foreign Commerce Clause was designed to prevent individual States from embroiling the Nation in disputes with other nations and triggering retaliation against the United States as a whole, see *Kraft Gen. Foods*, 505 U.S. at 79. It would be inconsistent with those overriding purposes of the Commerce Clause to sustain a state statute that singles out companies because they do business in another State or another nation for the purpose of affecting the internal policies of that State or nation.

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[22] That some private companies might engage in boycotts of suppliers does not mean that Massachusetts' conduct falls within the market-participant exception. As the Court has explained, "[t]he private actor under such circumstances would be attempting to 'regulate' the suppliers and would not be acting as a typical proprietor." *Associated Builders*, 507 U.S. at 229. But the private actor, unlike the State, would not be subject to the constraints of the dormant Commerce Clause. See *ibid.* ("When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding.").

That is not to say that the Constitution leaves no room for States to take action with respect to another country based on concerns about its record on human rights or similar matters. A State may adopt a resolution condemning the conduct of a repressive foreign regime. A State may petition Congress and the President to take action against the regime, including the imposition of economic sanctions, or to authorize the States themselves to take certain action. A State may decline to send its own officials on trade missions to the country so long as the repressive regime remains in power. And a State may call attention to its concerns in other ways. Such measures would not involve the State in any regulation of foreign commerce. They consequently would not implicate the Foreign Commerce Clause.

Moreover, we are not prepared to say that there would be no instances in which a State could take action in a commercial setting to express its concerns about violations of human rights. For example, a state statute that required state pension funds to divest their holdings in companies doing business in a particular country would present different considerations under the Foreign Commerce Clause than does a state statute that restricts a State from entering into procurement contracts with such companies. While a divestment statute might be regarded as regulatory to the extent that it is perceived to be seeking to affect conduct unrelated to the companies' performance in the financial markets, such a statute might also be regarded as serving only to disassociate the State, as an ultimate "owner" of such companies through the pension funds, from any affinity with a repressive regime that results from stock ownership, not to regulate the companies' conduct with respect to that regime. See *Board of Trustees* v. *Mayor & City Council*, 562 A.2d 720, 746 (Md. 1989) (describing the purpose of a divestment statute as "simply to ensure that city pension funds would not be invested in a manner that was morally offensive to many city residents and many beneficiaries of the pension

funds"), cert. denied, 493 U.S. 1093 (1990).[23] Nor could such a statute be expected to have as direct a regulatory effect as the Massachusetts Burma Act, because stock sold by the pension fund would be purchased by someone else, and the transaction would not be conditioned on any conduct by the purchaser, the company, or the foreign government. It may be that in appropriate circumstances a State could take other actions for similar purposes in a commercial setting. There is no occasion in this case, however, to consider the validity of state divestment statutes targeted at companies doing business in a particular country, or to consider the application of the market-participation exception to other state action with respect to foreign commerce. Whatever may be the precise limits of the market-participant exception, the Massachusetts Burma Act exceeds them.[24]

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[23] See also *Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 Op. Off. Legal Counsel 49, 51-59 (1986) (concluding that state and local divestment statutes come within the market-participant exception). The Office of Legal Counsel Opinion assumed that the same analysis would apply to statutes that prohibit state or local governments from entering into procurement contracts with companies that do business in a particular country. For the reasons discussed in the text, however, a statute like the Massachusetts Burma Act does not fall within the market-participant exception. To the extent that the Office of Legal Counsel Opinion is inconsistent with the views set forth in this Section or in Sections II and III, it no longer represents the position of the United States.

[24] Even if the Court were to hold that States have the latitude under the dormant Foreign Commerce Clause to adopt a policy of mandatory divestment from companies doing business in another country, it would not necessarily follow that States would have the same latitude to adopt a policy of mandatory divestment from companies doing business in another State. Whether the dormant Interstate Commerce Clause preserves any such power for the States would be informed by its purpose "to create an area of free trade among the several States," *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 618 (1981), by the reciprocity and mutual respect owed by the States to one another as coordinate sovereigns under the plan of the Constitutional Convention, and by the applicability of self-

II. THE MASSACHUSETTS BURMA ACT IS PREEMPTED BY THE FEDERAL STATUTORY SCHEME GOVERNING ECONOMIC SANCTIONS AGAINST BURMA

Because the regulation of foreign commerce and the conduct of foreign policy are committed to the national government exclusively, and because tension between federal and state laws in those areas raises unique concerns, the Supremacy Clause applies with special force to state laws that deal with foreign commerce and foreign policy. As this Court has explained, when a state law operates in a field of "uniquely federal interest," as opposed to "a field which the States have traditionally occupied," the "conflict with federal policy need not be as sharp" in order for the state law to be preempted. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 507 (1988). Accordingly, when a State legislates in an area "that touch[es] international relations," the Court should be "more ready to conclude that a federal Act * * * supersede[s] state regulation." *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

In *Hines*, the Court held that a Pennsylvania alien registration law was preempted by the subsequently enacted federal Alien Registration Act, even though the federal Act did not contain an express preemption provision or impose inconsistent obligations on aliens. 312 U.S. at 62-74. The Court explained that, at least in an area that is "so intimately blended and intertwined with responsibilities of the national government" over "the exterior relation of this whole nation with other nations and governments," *id.* at 66, a state law must yield to a federal law on the same subject if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 67. The Court emphasized that "Congress

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executing provisions of the Constitution that embody shared values and protect fundamental human rights in *all* of the States.

was trying to steer a middle path" in the Alien Registration Act, *id.* at 73, excluding from the final version various provisions that had been criticized as unduly harsh, such as a requirement that aliens carry identification cards at all times, *id.* at 71-73 & n.32. The Court found that the continued enforcement of the state law, which imposed requirements on aliens that were similar to some of those that had been omitted from the federal law, would undermine Congress's purpose "to obtain the information deemed to be desirable in connection with aliens * * * in such a way as to protect [their] personal liberties." *Id.* at 74.

In three respects, the Massachusetts Burma Act similarly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (IEEPA), the Federal Burma Act, and the Burma Executive Order. That is so even though the ultimate end sought by the United States and the State is the same: a free and democratic Burma that fully respects the human rights of its people.

A. Congress and the President have crafted a policy toward Burma that emphasizes the President's flexibility and discretion to impose, adjust, and suspend economic sanctions to reflect changing circumstances. The Massachusetts Burma Act, in contrast, undermines the President's flexibility and discretion with respect to Burma.

IEEPA "codifies Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to national security interests." *United States* v. *McKeeve*, 131 F.3d 1, 10 (1st Cir. 1997). IEEPA broadly defines the situations in which the President may impose economic sanctions, 50 U.S.C. 1701(a), and broadly defines the sorts of economic sanctions that the President may impose, 50 U.S.C. 1702(a)(1). IEEPA thus gives the President considerable flexibility with respect to the use of

economic sanctions to seek to influence the conduct of a foreign government. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981) (recognizing the importance of sanctions under IEEPA as a "'bargaining chip' to be used by the President when dealing with a hostile country").

The Federal Burma Act, which authorizes and directs the President to impose particular economic sanctions to respond to a particular international threat, applies that flexible approach in the specific context of Burma. The President is, for example, given broad discretion not only over whether to impose certain sanctions, but also over whether to suspend or terminate those sanctions and the other sanctions imposed under the Act. Federal Burma Act, § 570(a) and (e), 110 Stat. 3009-166 to 3009-167. Senator Cohen, the principal sponsor of the Federal Burma Act, emphasized the importance of giving "the administration flexibility in reacting to changes, both positive and negative, with respect to the behavior of the [Burmese regime]." 142 Cong. Rec. 19,212 (1996). Similarly, Senator McCain, a co-sponsor, described the Act as "giv[ing] the President, who, whether Democrat or Republican, is charged with conducting our Nation's foreign policy, some flexibility." *Id.* at 19,221.

The Massachusetts Burma Act is in tension with Congress's purpose to assure that the President has extensive discretion over the taking of economic action directed at a foreign government and the nature, extent, and duration of that action. The Act does not acknowledge any authority in the President to modify, suspend, or terminate its economic sanctions.[25] As a consequence, the Executive Branch's

[25] Although Congress or the President could expressly preempt state and local economic sanctions, such action could not, in some instances, be taken without significant diplomatic (or other) costs. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 436 (1964) (recognizing that "[o]ften the State Department will wish to refrain from taking an official position"

flexibility in dealing with the Burmese regime or in building international coalitions could be diminished, thereby undermining the ultimate goal of both the United States and Massachusetts.

B. In the Federal Burma Act and the Burma Executive Order, Congress and the President deliberately chose to "steer a middle path," *Hines*, 312 U.S. at 73, to the extent of permitting U.S. companies to continue to engage in many categories of business in Burma. The Federal Burma Act authorizes the President to prohibit only "new investment" in Burma by "United States persons," and excludes from the scope of federal restrictions the "performance of * * * a contract to sell or purchase goods, services, or technology." Federal Burma Act § 570(c) and (f), 110 Stat. 3009-166 to 3009-167.[26] The Burma Executive Order, issued pursuant to the Federal Burma Act and IEEPA, incorporates those restrictions. Thus, as one of its co-sponsors observed, the Federal Burma Act is a means of "strik[ing] a balance between unilateral sanctions against Burma and unfettered United States investment in that country." 142 Cong. Rec. at 19,279 (Sen. Breaux).

The Massachusetts Burma Act is inconsistent with the choice made by Congress and the President to restrict only "new investment" in Burma by "United States persons." It discriminates against *all* prospective contractors that do business in Burma. It extends not only to U.S. companies but also to foreign companies. It applies not only to companies that do business in Burma themselves, but also to

on whether an act of a foreign government violates international law because doing so "might be inopportune diplomatically" or might produce "[a]dverse domestic consequences").

[26] IEEPA permits the President to impose economic sanctions broader than those contained in the Federal Burma Act and the Burma Executive Order, but only with respect to transactions involving persons or property "subject to the jurisdiction of the United States." 50 U.S.C. 1702(a)(1).

companies with a parent, an affiliate, or a subsidiary that does business in Burma. And it applies not only to companies engaging in "new investment" in Burma, but also to companies engaging, directly or indirectly, in a wide array of other economic activity in Burma, even activity that commenced before its enactment. The Act thus discourages the sort of continuing economic activity in Burma by U.S. companies that Congress and the President chose not to prohibit.

C. The Federal Burma Act directs the President to "seek to develop, in coordination with members of ASEAN and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." Federal Burma Act § 570(c), 110 Stat. 3009-166. The Senate sponsors of the Act perceived that multilateral action is the most effective means of achieving those goals. See, *e.g.*, 142 Cong. Rec. at 19,212 (Sen. Cohen) ("[T]o be effective, American policy in Burma has to be coordinated with our Asian friends and allies."); *id.* at 19,219 (Sen. Feinstein) ("Only a multilateral approach is likely to be successful.").[27]

The Massachusetts Burma Act, by discriminating against foreign companies as well as U.S. companies that do business

[27] As a general matter, the United States pursues its foreign-policy objectives through multilateral cooperation, whenever possible. See, *e.g.*, J.A. 108 (testimony of then-Under Secretary of State Eizenstat) ("Sanctions are much more likely to be effective when they have multilateral support and participation. Multilateral sanctions maximize international pressure on the offending state while minimizing damage to U.S. competitiveness and more equitably distributing the sanctions burden across the international community."); accord J.A. 162 (testimony of Deputy Assistant Secretary of State Marchick); see also *Human Rights in Burma* 708 (testimony of Acting Assistant Secretary of State Smith) (Sept. 28, 1998) (describing the United States' multilateral strategy with respect to Burma).

in Burma, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The Act has generated friction between the United States and its allies because of its application to foreign companies, and thereby has distracted attention from Congress's purpose of encouraging the development of "a comprehensive, multilateral strategy" toward Burma. See pp. 8-9 & n.7, *supra* (discussing protests from the European Union, Japan, and ASEAN). Under Secretary of State Larson has thus observed that the Act "complicates efforts to build coalitions with our allies" to encourage democratic reform in Burma. Alan Larson, *State and Local Sanctions: Remarks to the Council of State Governments* 5 (Dec. 8, 1998). He has noted, for example, that "the EU's opposition to the Massachusetts law has meant that U.S. government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law." *Id.* at 6.[28] More broadly, the Massachusetts Burma Act and other such state and local statutes have, according to U.S. embassy reports, raised allies' concerns about the United States' credibility in international negotiations and its ability to deliver on its international commitments.

III. THE MASSACHUSETTS BURMA ACT IMPERMISSIBLY INTRUDES INTO THE CONDUCT OF FOREIGN AFFAIRS

This Court has recognized that state action may impermissibly infringe upon the national government's exclusive authority to conduct foreign affairs "even in [the] absence of a treaty" or an Act of Congress. *Zschernig*, 389 U.S. at 441.

[28] See also J.A. 115 (testimony of then-Under Secretary of State Eizenstat) (observing that the Massachusetts Burma Act and similar measures "risk shifting the focus of the debate with our European Allies away from the best way to bring pressure against [Burma] to a potential WTO dispute over [the Act's] consistency with our international obligations").

The Massachusetts Burma Act, even if not preempted by federal law, is nonetheless invalid as inconsistent with the Constitution's assignment of the foreign-affairs power to the national government, not the States.

In *Zschernig*, the Court struck down a state probate law that prevented the distribution of an estate to a foreign heir if the proceeds of the estate were subject to confiscation by his government. The Court explained that such statutes, which required state courts to engage in "minute inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements," had a "great potential for disruption or embarrassment" of the United States in the international arena. 389 U.S. at 435. The Court concluded that such statutes therefore had "a direct impact upon foreign relations," *id.* at 441, and not merely "some incidental or indirect effect," *id.* at 434. Accordingly, even though the state statute involved a subject "traditionally regulated" by the States and was not affirmatively preempted by an Act of Congress, *id.* at 440-441, the statute was held to constitute "forbidden state activity," *id.* at 436.

The Massachusetts Burma Act, even more clearly than the state statute in *Zschernig*, is an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432. In its purpose, its operation, and its consequences, the Act has an impact on foreign relations that is "direct," not merely "incidental." *Id.* at 441, 434.[29]

First, the Massachusetts Burma Act, as its sponsors declared, was designed as "foreign policy" legislation to "stop the violation of human rights" in Burma. J.A. 39 (statement of Rep. Rushing); J.A. 51 (statement of Sen. Walsh); see also

[29] The tension between the Massachusetts Burma Act and the national government's policy toward Burma is addressed more extensively in Section II, *supra*.

J.A. 31 (letter of Rep. Rushing). The State acknowledged earlier in this case that the Act is part of a "growing effort . . . to apply indirect economic pressure against the Burma regime for reform." Pet. App. 9. The Act thus constitutes a deliberate attempt by a State to conduct its own foreign policy.

Second, by its structure and design, the Massachusetts Burma Act operates to apply pressure on the Burmese regime through third parties, *i.e.*, companies, foreign and domestic alike, that seek to do business with the State, whether or not their business in Burma bears any relation to their business with State. Massachusetts does not suggest that the Act in any way advances its interests in procuring quality goods at a low price or in dealing only with responsible contractors; to the contrary, by eliminating qualified low bidders, the Act impairs the State's economic interests in order to advance its foreign-policy interests. Nor does the Act serve simply to disassociate Massachusetts from a direct relationship with the Burmese regime. Thus, the scope of the Act confirms that, as its sponsors stated, the Act is foreign-policy legislation.

Finally, as explained above (at 8-9, 34-35), the Massachusetts Burma Act has adversely affected the United States' own foreign policy in several respects. Most significantly, the Act has undermined the development of "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." Federal Burma Act § 570(c), 110 Stat. 3009-166. As senior U.S. officials have stated, the Massachusetts Burma Act, by antagonizing U.S. allies and trading partners, has diverted attention from Burma itself and complicated the implementation of such a multilateral strategy, which the United States views as the most effective means to seek reform in Burma. See pp. 9, 34-35, *supra*. In addition, the Act is inconsistent with the choice of Congress and the President to permit some U.S. economic activity in Burma

(short of "new investment"). The Act also has the potential to undermine the President's flexibility to adjust the economic sanctions against Burma based on the conduct of the Burmese regime, the actions of the international community, or other national security concerns.[30]

In sum, whatever the outer limits of the foreign affairs doctrine applied in *Zschernig*, those three characteristics of the Massachusetts Burma Act render it plainly invalid. The Act, in its purpose and effect, has implemented a state foreign policy toward Burma, and the Act has interfered with the conduct of the United States' own foreign policy. The Act thus has the sort of "direct" and detrimental, not merely "incidental," impact on the national government's foreign-affairs power that renders state action impermissible under *Zschernig*. 389 U.S. at 434, 441.

[30] The judgment by the United States condemning the abuses of the Burmese regime is now formally embodied in the Federal Burma Act and the Burma Executive Order. Consequently, the Massachusetts Burma Act does not present the concern, identified in *Zschernig*, of the States' making their own independent judgments regarding "the 'democracy quotient' of a foreign regime." 389 U.S. at 435.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID R. ANDREWS
Legal Adviser
Department of State

EDWIN S. KNEEDLER
Deputy Solicitor General

NEAL S. WOLIN
General Counsel
Department of the Treasury

BARBARA MCDOWELL
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN

ANDREW J. PINCUS
General Counsel
Department of Commerce

DOUGLAS HALLWARD-DRIEMEIER
Attorneys

FEBRUARY 2000

APPENDIX

The International Emergency Economic Powers Act, 50 U.S.C. 1701-1706, provides:

§ 1701. Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

§ 1702. Presidential authorities

(a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent

thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulations, instruction, or direction issued under this chapter.

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as foods, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; or[1]

(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph re-

[1] So in original. The word "or" probably should not appear.

cords, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 2404 of the Appendix to this title, or under section 2405 of the Appendix to this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18; or

(4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.

§ 1703 Consultation and reports

(a) Consultation with Congress

The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Report to Congress upon exercise of Presidential authorities

Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying—

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) Periodic follow-up reports

At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b) of this section.

(d) Supplemental requirements

The requirements of this section are supplemental to those contained in title IV of the National Emergencies Act [50 U.S.C. 1641].

§ 1704. Authority to issue regulations

The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter.

§ 1705. Penalties

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates any license, order, or regulation issued under this chapter.

(b) Whoever willfully violates any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

§ 1706. Savings provisions

(a) Termination of national emergencies pursuant to National Emergencies Act

(1) Except as provided in subsection (b) of this section, notwithstanding the termination pursuant to the National Emergencies Act [50 U.S.C. 1601 et seq.] of a national emergency declared for purposes of this chapter, any authorities granted by this chapter, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(2) Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(b) Congressional termination of national emergencies by concurrent resolution

The authorities described in subsection (a)(1) of this section may not continued to be exercise under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act [50 U.S.C. 1622] and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

(c) Supplemental savings provisions; supersedure of inconsistent provisions

(1) The provisions of this section are supplemental to the savings provisions of paragraphs (1), (2), and (3) of section 101(a) [50 U.S.C. 1601(a)(1), (2), (3)] and of paragraphs (A), (B), and (C)] of Section 202(a) [50 U.S.C. 1622(a)(A), (B), and (C)] of the National Emergencies Act.

(2) The provisions of this section supersede the termination provisions of section 101(a) [50 U.S.C. 1601(a)] and of title II [50 U.S.C. 1621 et seq.] of the National Emergencies Act to the extent that the provisions of this section are inconsistent with these provisions.

(d) Periodic reports to Congress

If the President uses the authority of this section to continue prohibitions on transactions involving foreign property interests, he shall report to the Congress every six months on the use of such authority.

The Federal Burma Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166, provides:

POLICY TOWARD BURMA

SEC. 570. (a) Until such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government. The following sanctions shall be imposed on Burma:

(1) BILATERAL ASSISTANCE.—There shall be no United States assistance to the Government of Burma, other than:

(A) humanitarian assistance,

(B) subject to the regular notification procedures of the Committees on Appropriations, counter-narcotics assistance under chapter 8 of part I of the Foreign Assistance Act of 1961, or crop substitution assistance, if the Secretary of State certifies to the appropriate congressional committees that —

(i) the Government of Burma is fully cooperating with United States counter-narcotics efforts, and

(ii) the programs are fully consistent with United States human rights concerns in Burma and serve the United States national interest, and

(C) assistance promoting human rights and democratic values.

(2) MULTILATERAL ASSISTANCE.—The Secretary of the Treasury shall instruct the United States executive director of each international financial institution to vote against any loan or other utilization of funds of the respective bank to or for Burma.

(3) VISAS.—Except as required by treaty obligations or to staff the Burmese mission to the United States, the United States should not grant entry visas to any Burmese government official.

(b) CONDITIONAL SANCTIONS.—The President is hereby authorized to prohibit, and shall prohibit United States persons from new investment in Burma, if the President determines and certifies to Congress that, after the date of enactment of this Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition.

(c) MULTILATERAL STRATEGY.—The President shall seek to develop, in coordination with members of the ASEAN and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma.

(d) PRESIDENTIAL REPORTS.—Every six months following the enactment of this Act, the President shall report to the Chairmen of the Committee on Foreign Relations, the Committee on International Relations and the House and Senate Appropriations Committees on the following:

(1) progress toward democratization in Burma;

(2) progress on improving the quality of life of the Burmese people, including progress on market reforms, living standards, labor standards, use of forced labor in the tourism industry and environmental quality; and

(3) progress made in developing the strategy referred to in subsection (c).

(e) WAIVER AUTHORITY.—The President shall have the authority to waive, temporarily or permanently, and sanction referred to in subsection (a) or subsection (b) if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.

(f) DEFINITIONS.—

(1) The term "international financial institutions" shall include the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the Asian Development Bank, and the International Monetary Fund.

(2) The term "new investment" shall mean any of the following activities if such an activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma, on or after the date of the certification under subsection (b):

(A) the entry into a contract that includes the economical development of resources located

in Burma, or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract;

(B) the purchase of a share of ownership, including an equity interest, in that development;

(C) the entry into a contract providing for the participation in royalties, earnings, or profits in that development, without regard to the form of the participation:

Provided, That the term "new investment" does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology.

The Burma Executive Order, Exec. Order No. 13,047, 3 C.F.R. 202 (1998), provides:

Prohibiting New Investment in Burma

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (Public Law 104-208) (the "Act"), the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 101 *et seq.*), and section 301 of title 3 of the United States Code;

I, WILLIAM J. CLINTON, President of the United States of America, hereby determine and certify that, for purposes of section 570(b) of the Act, the Government of Burma has committed large-scale repression of the democratic opposition in Burma after September 30, 1996, and further determine that the actions and policies of the Government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and declare a national emergency to deal with that threat.

Section 1. Except to the extent provided in regulations, orders, directives, or licenses that may be issued in conformity with section 570 of the Act and pursuant to this order, I hereby prohibit new investment in Burma by United States persons.

Sec. 2. The following are also prohibited, except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) or in regulations, orders, directives, or licenses that may be issued pursuant to this order:

(a) any approval or other facilitation by a United States person, wherever located, of a transaction by a foreign person where the transaction would constitute new investment in Burma prohibited by this order if engaged in by a United States person or within the United States; and

(b) any transaction by a United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

Sec. 3. Nothing in this order shall be construed to prohibit the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology, except:

(a) where the entry into such contract on or after the effective date of this order is for the general supervision and guarantee of another person's performance of a contract for the economic development of resources located in Burma; or

(b) where such contract provides for payment, in whole or in part, in:

(i) shares of ownership, including an equity interest, in the economic development of resources located in Burma; or

(ii) participation in royalties, earnings, or profits in the economic development of resources located in Burma.

Sec. 4. For the purpose of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, judicial person organized under the laws of the United States (including foreign branches), or any person in the United States;

(d) the term "new investment" means any of the following activities, if such an activity is undertaken pursuant to an agreement, or pursuant to the exercise or rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma on or after the effective date of this order:

(i) the entry into a contract that includes the economic development of resources located in Burma;

(ii) the entry into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma;

(iii) the purchase of a share of ownership, including an equity interest, in the economic development of resources located in Burma; or

(iv) the entry into a contract providing for the participation in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation;

(e) the term "resources located in Burma" means any resources, including natural, agricultural, commercial, financial, industrial, and human resources, located

within the territory of Burma, including the territorial sea, or located wit[illegible] the exclusive economic zone or continental shelf of Bu[illegible]rma;

(f) the term "economic development of resources located in Burma" shall not be construed to include not-for-profit educational, health, or other humanitarian programs or activities.

Sec. 5. I hereby delegate to the Secretary of State the functions vested in me under section 570(c) and (d) of the Act, to be exercised in consultation with the heads of other agencies of the United States Government as appropriate.

Sec. 6. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to me by section 570(b) of the Act and by IEEPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate the authority set forth in this order to other officers and agencies of the United States Government. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 7. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 8. (a) This order shall take effect at 12:01 a.m., eastern daylight time, May 21, 1997.

(b) This order shall be transmitted to the Congress and published in the Federal Register.

/s/ WILLIAM J. CLINTON
WILLIAM J. CLINTON

THE WHITE HOUSE
May 20, 1997

Jan 12 2000

No. 99-474

Supreme Court, U.S.
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JAN 12 2000
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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT, *Petitioners*,

v.

NATIONAL FOREIGN TRADE COUNCIL, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF NONPROFIT ORGANIZATIONS, AMICI CURIAE: ALLIANCE FOR DEMOCRACY, CATHOLIC FOREIGN MISSION SOC. OF AMERICA, CENTER FOR CONSTITUTIONAL RIGHTS, CONSUMERS CHOICE COUNCIL, FREE BURMA COAL., JEWISH LABOR COMM., HUMAN RIGHTS WATCH, HUMANE SOC. OF THE U.S., INT'L LABOR RIGHTS FUND, L.A. BURMA FORUM, NEW ENG. BURMA ROUNDTABLE, PHYSICIANS FOR HUMAN RIGHTS, REV. FRANK GRISWOLD—PRES. BISHOP—EPISCOPAL CHURCH, SIERRA CLUB, AMERICAN LANDS ALLIANCE, ARISE

(Additional Nonprofit Organizations Listed on Inside Cover)

IN SUPPORT OF PETITIONERS & FOR REVERSAL

DEBORAH ANKER
Counsel of Record
HARVARD IMMIGRATION & REFUGEE CLINIC
197 Friends Street - Suite 800
Boston, MA 02114
(617) 371-1234

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

4/10

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QUESTIONS PRESENTED

Did the Court of Appeals err in failing to consider the importance of international human rights law and principles as authority for the states to adopt a selective purchasing scheme? Did the Court err in overlooking the broad impact on state laws and long standing practices dating back to the slave trade? Did the Court err in failing to consider the consistency of the law with the stated federal goal of human rights as a part of foreign policy?

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STATEMENT OF *AMICI CURIAE*

Amici curiae are all engaged in aspects of advocacy for human rights, labor rights, and environmental justice in Burma and elsewhere, which are threatened by the decision of the Court of Appeals.[1] They include religious and voluntary organizations with over ten million members active at the local, state, national and international levels. The parties are concerned with the issues raised by this case regarding the legal authority of states to use selective purchasing to fulfill obligations of international law and to meet the demands of public morality reflected in international human rights principles. Specifically, *amici curiae* are concerned that the Court of Appeals failed to properly consider international human rights obligations, and the effect of the decision on a broad range of state and local activities in which *amici* have interests.

Amici curiae have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Counsel to the respondent, National Foreign Trade Council, has given their consent to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The Massachusetts Burma Law is a constitutionally valid and appropriate means for the state to respond to the moral concerns of the citizens of Massachusetts and gives effect to important objectives of international human rights within United States law and policy. Promoting respect for human rights, including an end to the inhumane practices of forced labor—a motivation for the Burma Law—is a primary purpose of the United Nations

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[1] As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of this brief. Funding for preparation of this brief was provided through the institutional support of Harvard Law School Human Rights Program, which is a program for research and clinical legal education.

Charter and major human rights treaties and declarations, including treaties ratified by the United States.

States' authority to legislate to promote these goals arises from their plenary power to legislate for public morality and from the delegation of authority to the states effected through the ratification of international human rights law. Since the prohibition of the slave trade, it has been the practice of states to adopt legislation that reflects the same moral impetus as the Burma Law. Moreover, the United States has frequently proclaimed human rights to be a primary goal of U.S. foreign policy and has even adopted the goal into its foreign assistance laws. The power to determine how public funds may be used to avoid contributing to human rights violations is consistent with these traditional powers, international law, and foreign policy. Massachusetts' Burma Law is a particularly apt application of this power, given current circumstances in Burma in which it is impossible to gauge the extent to which investment relies directly or indirectly on compulsory labor.

The Court of Appeals failed to consider the importance of the international human rights obligations that are adopted into U.S. law, only taking cognizance of certain disputed obligations under international trade law. As a result, the ruling of the Court will have a disruptive effect on a legitimate basis of state legislative authority. Further, by giving short shrift to the violations of human rights in Burma, the Court neglected the essential link between the law and the state's legislative authority.

The Massachusetts Law comes at a time of heightened global interaction, when it is difficult or even irrelevant to distinguish between laws of domestic and international effect. There is increasingly little distinction for Masschusetts taxpayers as to whether their money is spent to support forced labor in Burma, or in Massachusetts. States are deeply involved in foreign trade and actions that affect

foreign policy. The division of power between federal and state authorities is resolved largely through practice. The states have served as a laboratory for action on human rights that is then adopted by the federal government. Legislative initiatives like the Burma Law fulfill the U.S. commitment to international treaties that recognize the duties of individuals to help bring about respect for human rights. Where state legislation such as the Burma Law is consistent with federal law and policy, it would be inadvisable and potentially disruptive for the courts to intervene. In the absence of an impasse that prevents the federal system from ensuring that state action does not intrude upon foreign affairs and foreign commerce authority, the courts should uphold the Massachusetts law unless and until Congress explicitly determines to preempt it.

REASONS FOR GRANTING THE WRIT

I. THE MASSACHUSETTS BURMA LAW IS AN APPROPRIATE EXERCISE OF STATE POWER TO LEGISLATE IN PURSUIT OF INTERNATIONAL HUMAN RIGHTS OBJECTIVES

International human rights law creates an affirmative obligation on nation states to promote respect for universal human rights, including an end to forced labor and slave-like practices. The law serves as a foundation for the legislative authority of states of the United States in three respects. First, as adopted into U.S. law through Senate ratification, states have an explictly recognized role in the implementation of laws (*see* § A.2, *infra*). Second, to the extent it is customary international law, international human rights law (IHRL) is incorporated into federal law, providing separate grounds for state legislative jurisdiction (*see* § A.3, *infra*); and third, (*see* § I.B., *infra*), states have sovereign powers to legislate for the protection of public morality, of which human rights forms a part.

A. International human rights law as adopted or incorporated into U.S. law supports state action to protect human rights.

1. *International treaties to which the United States is a party create binding obligations acknowledged in U.S. law to respect and protect against violations of human rights, and to promote universal adherence to human rights norms.*

The constitutive documents of international human rights law (IHRL) commit the United States to promote universal human rights and to take measures to suppress egregious violations. Articles 55 and 56 of the U.N. Charter require members of the U.N. to "take joint and separate action" for the achievement of "universal respect for and observance of, human rights and fundamental freedoms for all . . .". United Nations Charter, arts. 55, 56 Stat. 1031, T.S. 993, *entered into force*, Oct. 24, 1945. Moreover, the Universal Declaration of Human Rights (UDHR), the cornerstone of IHRL, calls on member states to take "progressive measures, national and international, to secure universal and effective recognition and observance [of human rights] . . .". Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Finally, the constitutive documents of the International Labor Organization (ILO) require member states to implement policies to bring about universal respect for basic rights, affirming that "all national and international policies and measures, in particular those of an economic and financial character" are acceptable "only in so far as they may be held to promote and not to hinder" social justice. Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the Instrument for the Amendment of the Constitution of ILO Constitution, *entered into force* April 20 1948, *re-entered into force for the United States*, Feb. 18, 1980, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 104.

These obligations represented a revolutionary breakthrough in international law, extending the protection of the law beyond member states to individuals. Moreover, the treaties recognize that individuals also play a role in the protection and promotion of human rights. International Covenant on Civil and Political Rights, pmbl. para. 5, art. 5(1) (*entered into force* Mar. 23, 1976), 999 U.N.T.S. 171 at 173, 174; Universal Declaration of Human Rights, art. 29, G.A. Res. 217A, U.N. GAOR 3d Sess. U.N. Doc. A/810 (1948). Legislative initiatives such as the Massachusetts Burma Law, An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), ch. 130, 1996 Mass. Acts 239 (codified at Mass. Gen. Laws Ann. ch. 7 §§ 22G-22M (West Supp. 1999) (hereinafter, Burma Law), because of their close proximity to local citizens' initiatives, exemplify this aspect of individual responsibility.

International treaties prohibiting slavery and slave-like conditions, including forced labor and torture, clearly indicate that enforcement of human rights is the concrete obligation of every member, not simply a diffuse commitment of international organizations. In ratifying these treaties, the U.S. has committed itself to the eradication of such violations practiced in Burma.

The first international efforts to outlaw slavery were made during the Congress of Vienna of 1815. Following WWI, the world community enacted the Slavery Convention of 1926,[2] in which contracting parties agreed to take all measures to "prevent forced labour from developing into conditions analogous to slavery." Brief of *Amicus*

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[2] Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, *entered into force* Mar. 9, 1927; for the U.S. Mar. 21, 1929, 46 Stat. 2183, *amended by* the Protocol Amending the Slavery Convention of Sept. 25, 1926, *entered into force* Dec. 7, 1953 for the protocol; July 7, 1955 for annex to protocol; Mar. 7, 1956 for the U.S., 7 U.S.T. 479.

Curiae, AFL-CIO et al, to the U.S. Court of Appeals for the First Circuit in *NFTC v. Laskey et al, citing Forced Labour in Myanmar (Burma)*, Report of the Commission of Inquiry appointed under Art. 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29) (1998), para. 199 and 200.

Thus, for example, ILO Convention (No. 105) Concerning the Abolition of Forced Labor outlaws forced or compulsory labor in five specific circumstances, ILO 105, *entered into force*, Jan. 10, 1957, 320 U.N.T.S. 291, ratified May 14, 1991, which have been violated by the Burmese military regime. (*See*, § I.C. *infra.*) Among them:

> Each Member of the ILO which ratifies this Convention undertakes to suppress and not to make use of any form of compulsory labour . . .
>
> (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
>
> (b) as a method of mobilising and using labour for purposes of economic development;
>
> (c) as a means of labour discipline. . . .

(Art. 1). Comments made by senators in support of the ILO Convention indicate an acknowledgement of an implicit extraterritorial purpose. In arguing for passage of ILO Convention No. 105 in 1967, former Supreme Court Justice and Ambassador Arthur Goldberg reasoned, "[w]hen countries are permitted to use forced labor to produce goods and services, that, of course, places our own country at a great competitive disadvantage." Hearing of the Ad Hoc Subcommittee on Human Rights Conventions, of the Committee on Foreign Relations (Feb. 23, 1967). Prior to Senate ratification in 1991, the chair of

the Senate Foreign Relations Committee, Jesse Helms, explained that the ILO Convention authorizes policy measures to suppress forced labor outside of the territory of the United States. 137 Cong. Rec. S5728, 102nd Cong., 1st Sess. (1991) (statement of Sen. Helms).

The Convention Against Torture (CAT) also requires States Parties to take measures to prohibit acts of torture and cruel, inhuman or degrading treatment or punishment *at home or abroad*. It explicitly requires states to punish torturers (or extradite them to a state that will do so) no matter what the country of origin. (Art. 4, CAT, S. Treaty Doc. No. 100-20, 102nd Cong., 2d Sess. v-vi (1988), G.A. res. 39/46, annex, 29 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force*, June 26, 1987, *ratified* 1992).

2. *International Human Rights Conventions, adopted into U.S. law by ratification, reserve substanital responsibility for implementation of human rights norms to the states.*

Cognizant of the goals of the IHRL conventions and their place in fulfilling the purpose of the United Nations and the ILO, Congress has knowingly granted authority to the states to act with extraterritorial effect.

To this end, Congress has ratified Convention No. 105 on Forced Labor, the CAT, and the International Covenant on Civil and Political Rights (ICCPR). Within each of these conventions, not only has Congress committed itself to a long standing obligation to suppress slavery and forced labor, it has explicitly reserved to the states a practical role in implementation.

The Constitution of the ILO (Art. 19.7), overseeing Convention No. 105 on Forced Labor (instructing member States to suppress and not to make any use of forced or compulsory labor like that currently practiced in Burma), contains a federalism clause that defers to the

authority of sub-national governments, including states. Constitution of the International Labour Organization, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, *amended by* 7 U.S.T. 245, T.I.A.S. No. 3500, 191 U.N.T.S. 143 (1953), 14 U.S.T. 1039, T.I.A.S. No. 5041, 466 U.N.T.S. (1962), U.S.T. 3253, T.I.A.S. No. 7987 (1972). The role of the states in the application of conventions is also important.

U.S. Representative to the ILO, Philip M. Kaiser, explained the meaning of the ILO Constitution's federalism clause:

> Where, in a country with a federal government like our own, it is decided that the subject of a convention comes under the jurisdiction of the constituent states *as well as* the federal authority, that particular convention is treated like a recommendation. It is referred to the state for such action as they care to take. . . .

Hearing, Subcommittee on Labor and Public Welfare on S.J. Res. 117, 84th Cong. 2d Sess. (1956) (Statement of Asst. Secretary of Labor Philip M. Kaiser).

A federalist reservation was included when the U.S. Senate ratified both the CAT (prohibiting acts of torture and cruel, inhuman or degrading treatment and requiring affirmative steps to punish torture that occurs *at home or abroad*) and the ICCPR (obligating signatories to respect and ensure the enumerated rights to all individuals without regard to status and to adopt legislation to put into effect these rights and their remedies). The ICCPR reservation on federalism (similar to that adopted for the CAT) states:

> That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments.

Understanding No. 5, 138 Cong. Rec. S4784 (1992).

Clearly, the obligation to implement these two conventions, one to suppress torture and forced labor, the other to enforce protection of basic human rights, was explicitly left in part to the states.

3. *Customary International Law (CIL), as part of U.S. law, provides further authority for state legislation intended to promote universal respect for human rights and suppress its violations.*

Since 1900, it has been accepted that CIL forms an integral part of U.S. law to be applied by the courts. *The Paquete Habana*, 175 U.S. 677 (1900).

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves particularly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Id.* at 700.

The American Law Institute's Third Restatement of Foreign Relations Law (Restatement), explains that CIL "results from a general and consistent practice of [nation] states followed by them from a sense of obligation" and is also created by international agreements "when such agreements are intended for adherence by [nation] states generally." Restatement (Third) of Foreign Relations Law § 102 (1987).

Violations of CIL as recognized by U.S. courts include "slavery or slave trade," "torture or other cruel, inhuman

or degrading treatment or punishment," and "a consistent pattern of gross violations of internationally recognized human rights." *Id.* All of these violations have been documented in Burma, and are legitimated and supported by continued U.S. economic involvement with the illegitimate ruling regime (*see* § I.C. *infra*). Thus, the United States has a *duty* to respond to these violations of CIL by appropriate means including shaping "its trade, aid or other national policies so as to dissociate itself from the violating state or to influence that state to discontinue the violations." *Id.* § 702, cmt. o (1987).[3]

Customary international law as part of federal law requires actions to deter or prevent violations of human rights. Thus, as the Massachusetts Burma statute is consistent with CIL and federal common law, it should be viewed as contributing to, rather than contradicting, federal law. Moreover, if it is consistent with international law then, by analogy to the *Charming Betsy* standard,[4] it should be deemed consistent with federal law intended to achieve the same purpose, namely the federal Burma statute. Foreign Operations, Export Financing, and Related Programs Appropriations Act 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consoli-

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[3] As CIL develops, it becomes part of federal common law. In *Xuncax v. Gramajo*, the court states that "it is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law." *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (citing *The Poquette Habana*,, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *Trajano v. Marcos* (Marcos Estate I), 978 F.2d 493, 502 (9th Cir.), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

[4] *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (that Congress will be assumed to have acted in accordance with international law unless the contrary conclusion is unavoidable).

dated Appropriation Act 1997), Pub. L. No. 104-208 § 101(c), 110 Stat. 3009-121 to 3009-172 (1996).

B. The Massachusetts law, which conditions public spending on the values embodied by international human rights law, is consistent with the states' traditional authority to legislate for the general welfare and public morals.

The powers of the states are plenary, in contrast to the enumerated powers of the federal government, "which underscore the vital role reserved to the states by constitutional design (citations omitted)." *John H. Alden, et al., Petitioners v. Maine*, 119 S. Ct. 2240, 2247 (1999). "Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance." *Id.*

As the Court of Appeals acknowledged, "It is by now well understood that a state can, through its purchasing practices, pursue a variety of objectives, as long as its actions do not violate other laws or the Constitution." *National Foreign Trade Council v. Andrew S. Natsios et al.*, 181 F.3d 38, 70 (1st Cir., June 22, 1999), *citing Foto USA, Inc. v. Board of Regents of the Univ. Sys. of Florida*, 141 F.3d 1032, 1036-37 (11th Cir. 1998).

States may use their purchasing power to advance social goals, which include limiting state business to market actors that comport with standards of integrity and public morality. *Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1971). This authority is recognized as an exception to commerce clause limits on state powers when the state acts as a "guardian and trustee" of taxpayer resources. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438, 441 (1980).

Reeves and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), involved situations in which states in-

tended their commercial activity to enhance public values. *NFTC*, 181 F.3d at 64. The Court of Appeals in the instant case recognized that the Supreme Court upheld state legislation based on public values in these cases. *Id.*

In the context of state selective purchasing laws aimed at South Africa's apartheid policy, constitutional scholar Laurence Tribe testified to the U.S. Senate that, although U.S. foreign policy is constitutionally reserved to the federal government, "it is equally fundamental that states and their public subdivisions are assigned the responsibility, under our Constitution, of deciding where and how to invest the public resources they collect through taxing and other sovereign measures." Absent a Congressional choice to "displace this historically localized responsibility" of states, Tribe explained, "[T]here is nothing in federal constitutional law that could conceivably support taking from state legislatures and municipal authorities this basic control over their own economic destinies." 132 Cong. Rec. S 12533, 99th Cong., 2d Sess. (1986).

International human rights law is increasingly looked to as a standard for public values and morality. It constitutes "those benefits deemed essential for individual well-being, dignity and fulfillment and . . . a common sense of justice, fairness, and decency." Louis Henkin, THE AGE OF RIGHTS 2 (1996).

A number of states and municipalities have explicitly linked general welfare, public morality and economic concerns to international human rights, recognizing and incorporating various international human rights accords as local law. Rhode Island used a U.N. General Assembly resolution on the rights of mentally retarded persons as a guide for state policy. *Cited in* Peter J. Spiro, *The States and International Human Rights*, 66 Fordham L. Rev. 567, n.84 (1997): Rhode Island Gen. Laws 18 020 05 (1996). Burlington, Iowa incorporated provisions of the International Convention on the Elimination of All Forms

of Racial Discrimination.[5] *Id.* at 591 and n.84. Berkeley, California incorporated Articles 55 and 56 of the U.N. Charter (on international economic and social cooperation) into a Human Rights Ordinance;[6] and San Francisco passed a local ordinance to implement the protections of the Convention on the Elimination of All Forms of Discrimination Against Women.[7]

It is clear that standards of public morality may be contravened by international trade that brings products made under morally abhorrent circumstances into the state of Massachusetts, displacing other products and enabling repressive governments to continue to violate rights with impunity. Under the Court of Appeals decision, Massachusetts might exclude products of local labor or rights abusers from state purchase, but would be forced to purchase products created under patently worse conditions abroad. Massachusetts citizens must be allowed to choose whether their purchasing dollars should support slave labor conditions in Burma, just as they choose to exclude local producers who fail to meet local standards of integrity and public morality.

C. The Massachusetts Burma Law is a legitimate response to the unavoidable connection between the activity of companies doing business in Burma and the capacity of the Burmese military regime to commit human rights violations.

For more than ten years, the Burmese military regime has consistently committed gross human rights violations. The government "killed thousands of civilians in seizing power, and has since killed, tortured, raped, imprisoned and forcibly relocated hundreds of thousands of Burmese people." Amnesty International, "Myanmar: 10th Anni-

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[5] Human Rights Ordinance 2807 (Sept. 2, 1986).

[6] Ordinance 5985 N.S. (Aug. 16, 1990).

[7] Ordinance No. 128-98, Chapter 12K, Apr. 13, 1998, *see* website *www.ci.sf.ca.us/cosw/cedaw/*.

versary of Military Repression," (August 7, 1998). U.S. government, UN and ILO reports document continuing violations including forced labor, suppression of a democratically elected government, and suppression of individual political rights. *See* U.S. State Department Report to Congress (June 13, 1997) 104-106; Appendix, 490-492.

In a comprehensive study detailing the horrors of forced labor, the U.S. Department of Labor states that forced labor affects thousands of people every day and "has most likely been suffered by millions in recent years." U.S. Dept. of Labor, Bureau of International Labor Affairs, *Report on Labor Practices in Burma* (Sept. 1998) at n.151. Human Rights Watch estimated that at least two million people had been forced to work since 1992 on construction roads, railways and bridges. Human Rights Watch/Asia, BURMA—ENTRENCHMENT OR REFORM? HUMAN RIGHTS DEVELOPMENTS AND THE NEED FOR CONTINUED PRESSURE (July 1995) at 14. The massive use of forced labor on infrastructure projects and in some state enterprises has been well documented by international organizations, such as the International Labour Organization, the UN Human Rights Commission, and private human right monitors, including some who are amici on this brief.

The Burmese government's use of forced labor on such a vast scale, coupled with its egregious violations of worker rights, has clear implications for international trade and the world economy. International commerce with companies owned or controlled by the Burmese military regime, direct business relations with the regime, and virtually all trade with Burma contribute to the continuation of human rights violations by providing support for the government's balance of payments, which is directly connected with military expenditures by the Burmese military regime for purposes of domestic suppression. *See* U.S. Embassy, Rangoon, *Foreign Economic Trends Report—Burma* (1997) at 15-16.

Through the enactment of selective purchasing laws, states are denying economic support for a system which relies heavily on forced labor. The Burmese government commonly employs forced labor in the pursuit of economic development and, at times, economic profit. Companies investing in Burma have no effective means of gauging to what extent their investment relies on the product of compulsory labor, directly or indirectly. Until the Burmese government brings an absolute end to the practice, and this can be independently verified, companies investing in Burma run the risk of being complicit in the exploitation and perpetuation of this grave violation of human rights. The people of Massachusetts should not be forced themselves to be complicit in such continuing violations.

II. MASSACHUSETTS' BURMA LAW IS CONSISTENT WITH A MAJOR FEDERAL FOREIGN POLICY GOAL TO PROMOTE UNIVERSAL RESPECT FOR HUMAN RIGHTS

International human rights is a principal goal of this country's foreign policy. Recognizing the obligations to which the U.S. is a party under international law, Congress codified the observance of such a policy in the Foreign Assistance Act:

> The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations . . ., promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . . Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

§ 502B of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2304(a)(1).

The federal government has used human rights practices as a basic indicator of its willingness to maintain

relations with specific countries, prohibiting foreign and security assistance to gross violators of human rights. *Id.* at (a)(2), and 22 U.S.C. § 2151(n).

This policy has been retained through four presidential administrations and has inspired a variety of laws, proclamations and initiatives intended to encourage the involvement of a broad spectrum of the U.S. population, from local citizens to corporations.[8] The Executive has been engaged in efforts to set moral guidelines in foreign economic relations through codes of conduct and model business principles.[9] Even before the articulation of a general human rights policy, the federal government linked concerns over slave labor with trade in the Hawley Tariff Act of 1930, which prohibited the importation into the U.S. of products made by convict labor. Pub. L. No. 71-361, 46 Stat. 590.

It does not diminish the consistency with U.S. foreign policy that a European Union (EU) official would criticize Massachusetts' law. *See, NFTC*, 181 F.3d at 54. The EU was focusing entirely on the World Trade Organization (WTO); but the WTO is a separate economic trade regime that provides its own mechanisms for conflict resolution that *inter alia* involve a high degree of diplomacy. Further, WTO implementing legislation unambiguously prohibits private causes of action such as the National Foreign Trade Council challenge to the Massachusetts

[8] *See e.g.*, the International Religious Freedom Act of 1998, 22 U.S.C.A. §§ 6401-6450 (Supp. 1999); Prohibition of acquisition of products produced by forced or indentured child labor, E.D. of President, June 12, 1999; Treasury and Government Appropriations Act for 1998, 105 P.L. 61, 111 Stat. 1272, 1997 enacted H.R. 2378 as cited in 143 Cong. Rec. D1103, October 20, 1997 (concerning child labor).

[9] *See e.g.*, Clinton Administration Model Business Principles (U.S. Dept. of Commerce 1996); and Apparel Industry Partnership Agreement, *see* website of Lawyers Committee for Human Rights at www.lchr.org/sweatshop/aipfull.htm.

Burma Law that are related to the alleged inconsistency of a state law with WTO rules. Uruguay Round Agreements Act of 1994 (URAA). P.L. 103-465, § 102; 19 U.S.C. § 3512.

It is, moreover, ironic that EU concerns would influence the court in this domain, when their adamant objections to other state policies that raise international human rights violations have been essentially ignored. The EU and other foreign nations, international and non-governmental organizations, have repeatedly condemned such local state practices as police brutality, prison conditions, and the death penalty. *See, e.g.*, Human Rights Committee, Comments on U.S.A., U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1413th mtg., P 17 U.N. Doc. CCPR/C/79/Add. 50 (1995), *cited by* Spiro, 66 Fordham L. Rev. at 572 and n.4. The European Parliament went so far as to adopt a resolution strongly condemning the execution by Texas of Karla Faye Tucker; some M.P.s called for an investment boycott of states imposing the death penalty; and shareholder pressure in Europe is mounting for the withdrawal of investments from such states. *See*, "UK Presidency Plays up Human Rights in Trade Policy," Eur. Rep., Feb. 7, 1998, *cited in* Peter J. Spiro, *Role of the States in Foreign Affairs: Foreign Relations Federalism*, 70 U. Col. L. Rev., 1223, at 1263 and n.155 (1999). Having rejected the EU's concerns for the human rights implications of state laws in the past, far less should the courts be swayed in this situation, where the EU is asking to invalidate a state law that actually conforms to international human rights law.[10]

The EU has challenged various other U.S. state laws as well, arguing that numerous kinds of state law consti-

[10] In ratifying international human rights treaties, the federal government has "made a state's respect for the right of its inhabitants . . . a concern of U.S. foreign policy." Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 150 (2d ed. 1996).

tute trade barriers, including subsidies,[11] health and safety standards,[12] environmental standards [13] and taxation of multinational corporate income.[14] Based on EU trade reports and the WTO provisions that they cite, a 1994 study identified 90 potential conflicts between WTO provisions and state law in California alone.[15] Canada has similarly complained about various categories of state law including state-level inspection requirements for goods and food safety,[16] licensing and taxation of alcoholic beverages,[17] and newsprint recycling requirements.[18]

III. THE COURT OF APPEALS' DECISION UNDERMINES A TRADITION OF STATES' INVOLVEMENT IN LEGISLATING TO PROMOTE HUMAN RIGHTS AND HUMANITARIAN CONCERNS, DATING BACK TO STATE PROHIBITION OF THE SLAVE TRADE

The Decision of the Court of Appeals undermines a long tradition of state activism at the juncture of international trade and human rights. From the abolition of the slave trade to apartheid in South Africa, a rich tradition of state activism has helped give voice to citizen concern and indeed, shaped domestic and foreign policy. When the drafters of the Constitution agreed to bar fed-

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11 *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 23 (Brussels, Oct. 1998).

12 *Id.* at 11.

13 *Id.*

14 *Id.* at 5.

15 *See* Robert Stumberg, GATT IMPACT ON STATE LAW: CALIFORNIA (Center for Policy Alternatives, 1994).

16 *See* Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 13 (Ottawa, Jan. 1999).

17 *Id.* at 15.

18 *Id.*

eral legislation to ban the slave trade (until 1808), there was no implication that states would have to follow suit. U.S. CONST. art. I, §9 cl. 1. In fact, one author of the Federalist Papers pleaded with the states to take action during that period. Despite the absence of federal legislation, the practice of slavery "may be totally abolished," wrote James Madison, "by a concurrence of the Few States which continue the unnatural traffic, in the prohibitory example which has been given so great a majority of the Union." THE FEDERALIST 43 (James Madison).

Economic boycotts and other forms of citizen activism have been a traditional method adopted by states and municipalities to convey the sentiments of the population since the Boston Tea Party. *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constituitonal Order*, 139 U. Pa. L. Rev. 287, 331 (1990) (citing colonial boycotts used to oppose British rule, and the right of assembly asserted to justify exercises of popular power (at 336)). *See further*, Brief for Petitioner, *NAACP v. Claibourne Hardware Co.*, 458 U.S. 886 (1982) (describing the centrality of boycotts in the American democratic tradition).

From the ratification of the Constitution, state and local governments participated in foreign policy without legal challenge. Despite a long-standing policy of neutrality in the war between Great Britain and France declared by President Washington, in 1798 the city of Boston raised $125,000 to build two battleships in response to public cries for war against France. There were several other challenges to federal supremacy in the nineteenth century that were resolved through political means. Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 65 Foreign Policy 158, 164 (1986).

This tradition of activism on the local and state level has continued without threatening federal supremacy in

foreign affairs. For example, in the 1970s, even before the federal government took action, 13 states responded to the Arab League's boycott of Israel with anti-boycott laws of their own. Earl H. Fry, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs,* Council on Foreign Relations, 94 (1998).

The use of economic leverage to effect international affairs through trade became even more significant in the 1980s. Divestment in South Africa was spearheaded by state and local jurisdictions for nearly two decades in express disagreement with the stated federal policy of constructive engagement. By the fall of 1985, divestment bills had been enacted by 19 states and 62 cities and counties. In the end, however, it culminated in the federal Comprehensive Anti-Apartheid Act of 1986. Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 Tul. L. Rev. 469, 471-472 (February 1987).

The moral interests of municipalities affecting foreign affairs is also expressed through other means involving citizen activism and local initiatives. It is largely recognized that promotional programs like sister-city arrangements not only have an impact on foreign relations, but were intended to do so. Indeed, these programs began after WWII as a proposal by President Dwight D. Eisenhower to deliver foreign aid and to involve ordinary citizens in foreign relations. Eduardo E. Neret & Marcio W. Valladares, *The Florida International Affairs Act: A Model for State Activism in Foreign Affairs*, 1 J. Transnational Law & Policy 197, n.3 (1992). According to Sister Cities International, there are 2,100 sister city arrangements in 127 countries.[19] A number of cities, including Atlanta, Berkeley, Louisville, Milwaukee, St. Paul

[19] *See* website of Sister Cities International: *www.sister-cities.org* ("Facts at a Glance").

and Wichita have used their sister-community ties to pursue specific human rights objectives, such as stopping the forced removal of black townships in South Africa. Shuman at 174. "Diplomacy" by state and municipal elected officials is another example, such as the lobbying visit to Vietnam of a California mayor and state senator for the release of men whose families had left Vietnam at the end of the war and resettled in California.[20]

IV. THE COURT OF APPEALS DECISION PLACES THE CONSTITUTIONALITY OF MANY STATE AND LOCAL LAWS IN DOUBT, AND WILL LIKELY LEAD TO A DRAMATIC INCREASE IN LEGAL CHALLENGES

State and municipal involvement in foreign affairs has increased steadily in recent years with the knowledge and awareness of the federal government and Congress. In myriad ways, states have entered the foreign policy domain; some are explicitly linked to trade, while others have more express human rights or social objectives. Many are linked to state and local procurement. The constitutionality of all is at stake if the Court of Appeals' decision is allowed to stand.

In this era of enormous economic and technological change, citizens are demanding that their state and local governments do more to protect and enhance their interests. What's more, pervasive global interdependence has diminished the distinctions between national and sub-

[20] In 1989, Irvine (CA) mayor Larry Agran and California state senator Art Torres went to Vietnam to lobby for the release of 30 men whose families had fled Vietnam and resettled in California. By the end of the year, the visit had achieved the first "good faith" release. Michael H. Schuman, *Id.* at 174. Mayors of larger U.S. cities often lead international missions to pursue economic, social, cultural and other objectives. Fry at 84.

national interests, as well as between local values and international human rights.[21]

State and local governments directly control vast procurement budgets. Spiro, 70 U. Colo. L. Rev. at 1249. It is therefore not surprising that states and municipalities now see international trade and foreign investment as critical to their economic well-being and affecting their social policies. At least 16 states have official international trade offices, Alejandra Carvajal, *Note: State and Local "Free Burma" Laws the Case for Sub-National Trade Sanctions,* 29 Law & Pol'y Int'l Bus. 257, n.71, and nearly four-fifths of the states maintain more than 160 offices abroad for trade, investment, and tourism promotion purposes. Fry at 15. Almost all state governments have established executive agencies or bureaus attached to the Office of the Governor that specialize in international economic activities. *Id.* at 72.

Florida is one state that has been extremely active in foreign relations and investment. The "Florida International Affairs Act" is a far-reaching statute, the express purpose of which is to "articulate a clear policy for international economic development and policy formation . . ."; lobby and promote Florida's interests at both national and international levels; work to "influence state, federal and international trade policies that affect Florida's ability to compete in world markets"; and establish a commission to "study and make recommendations on the state's policy concerns related to immigration, criminal justice, human

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21 For example, foreign firms are creating jobs in the U.S. five times faster than American owned companies; one in six private-sector jobs in the U.S. is now linked to the global economy. The number of Americans working for subsidiaries of foreign companies in the U.S. now equals five million. Fry at 32 and 6; and *see study by* Organization for International Investment, as reported in L.A. Times, 23 April 1998.

rights, drugs and other internationally related issues."[22] Other states have created similar though less comprehensive bodies, including Arizona, California, Illinois, Kentucky and New Jersey. Neret & Valladares at 200-202 and n.68.

State procurement limits or divestment have been adopted to influence other foreign issues including perceived employment discrimination against the Catholic minority in primarily Protestant Northern Ireland. Fourteen states, including Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, and 34 cities have enacted advisory or mandatory divestment laws directed towards firms that have business relationships with Northern Ireland. Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw. J. Int'l L. Bus. 563, 568-569 (1993). Indeed, Massachusetts approved a restriction on public pension investment in firms that sell weapons or munitions that are used in Northern Ireand. An Act Terminating the Investment of Public Pension Funds in Firms Contributing to the Oppression in Northern Ireland, Mass. Gen. Laws. Ann. Ch. 32, § 23(1)(d)(iii), *approved* April 4, 1983.

The mere threat of losing financial services contracts with state and local governments persuaded Swiss banks to settle claims related to their failure to return the assets of Holocaust victims. Matthew Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l Law 1, 7 (1999), *citing* Stephen D. Moore, *Choices Few to Swiss Banks on War Claims*, Wall St. J., Aug. 14, 1998, A12. *See also, U.S. States get involved in Nazi-Era Swiss Bank Controversy*, Agence France Presse, Oct. 22, 1997.

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22 Fla. Stat. Ann. § 288.801 (1991).

Moreover, many jurisdictions have selective purchasing laws similar to the Massachusetts law that restrict their procurement of goods and services from companies that do business in countries that suppress democracy and violate human rights. *NFTC*, 181 F. 3d at 47. In addition to Massachusetts, over 20 municipalities have enacted analogous laws restricting purchases from companies that do business in Burma. Other jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, Sudan, Indonesia, Tibet, and other nations. Organization for International Investment, State and Municipal Sanctions Report, as of July 16, 1999.[23]

In addition to procurement measures intended to express support for democracy and human rights, as discussed above, numerous municipalities and 48 states have adopted at least one environmental procurement preference that could be challenged under the Court of Appeals' reasoning.[24] The 48 states with environmental purchasing preferences include 34 states with preferences for recycled materials generally,[25] 20 states with separate purchasing

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[23] *See* website: www.ofii.com/issues/sanction.html.

[24] As with the Massachusetts Burma Law, foreign governments have suggested that environmental procurement preferences constitute trade barriers. *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 2 and 18-19 (Brussels, Oct. 1998); Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 14 (Ottawa, Jan. 1999); Ministry of International Trade & Investment, 1998 REPORT ON THE WTO CONSISTENCY OF TRADE POLICIES BY MAJOR TRADING PARTNERS (Japan 1998).

[25] Alaska Stat. § 36.30.337 (Michie 1998); Cal. Pub. Cont. Code § 12310 (West 1998); Del. Exec. Order 82 (1990); Fla. Stat. Ann. § 287.045 (West 1998); Haw. Rev. Stat. § 103D-1005 (1997); 415 Ill. Comp. Stat. 20/3 (West 1998); Ind. Code § 5-22-15-16 (Michie 1998); Iowa Code Ann. § 216B.3 (West 1997); Kan. Stat. Ann. § 75-3740b (1997); Ky. Rev. Stat. Ann. § 45A.520 (Banks-Baldwin 1998); La. Rev. Stat. Ann. § 30:2415 (West 1998); Me. Rev. Stat. Ann. tit. 5, § 1812 (West 1997) (recycled materials other than paper); Md. Code Ann., State Fin. & Proc. § 14-402 (1998); Minn. Stat. Ann. § 16B.121 (West 1998); Miss. Code Ann., § 49-31-7 (1998); Mo. Ann. Stat. § 34.031 (West 1997) (recycled solid waste materials); Mont. Code Ann. § 75-10-806 (1997); Neb. Rev. Stat. § 81-15,159 (Michie 1998); Nev. Rev. Stat. § 386.417 (1997); N.H. Rev. Stat. Ann. § 21-I:11 (1997); N.M. Stat. Ann. § 13-1-135.1 (Michie 1998); N.Y. Pub. Auth. Law § 2878-a (McKinney 1998); N.C. Gen. Stat. § 130A-309.14 (1997); Ohio Rev. Code. Ann. § 125.082 (West 1998); Okla. Stat. Ann. tit. 74, § 85.53 (West 1998); Or. Rev. Stat. § 279.570 (1997); R.I. Gen. Laws § 37-2-76 (1997); S.C. Code Ann. § 44-96-140 (1997) (recycled and recyclable materials); S.D. Codified Laws § 5-23-41 (Michie 1998); Tex. Health & Safety Code § 361.426 (West 1998); Vt. Stat. Ann. tit. 3, App. Ch. 7, Exec. Order 24-86 (recycled materials and nonwasteful packaging); Wash. Rev. Code Ann. § 43.19.A.005 (West 1998); W. Va. Code § 20-11-7 (1998); Wis. Stat. Ann. § 16.72 (1998).

preferences for recycled paper,[26] and several addressing other recycled materials.[27]

Many local governments have also adopted procurement policies for products with recycled content, ranging from paper [28] to street signs [29] to playgrounds to park benches

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[26] Alaska Stat. § 36.30.333 (Michie 1998); Ariz. Rev. Stat. Ann. § 41-2533 (West 1998); Ark. Code Ann. § 19-11-260 (Michie 1998); Cal. Pub. Cont. Code § 12162 (West 1998); Cal. Educ. Code § 32373 (West 1999) (educational agencies); Colo. Rev. Stat. Ann. § 24-103-207 (West 1998); Conn. Gen. Stat. Ann § 4a-67a (West 1998); Ga. Code Ann. § 50-5-60.2 (Michie 1998); Me. Rev. Stat. Ann. tit. 5, § 1812-B (West 1997); Mass. Gen. Laws. Ann. ch. 7 § 22 (West 1998); Mich. Comp. Laws Ann. § 18.1261b (West 1998); Minn. Stat. Ann. § 16B.122 (West 1998); N.J. Stat. Ann. § 13:1E-99.27 (1998); N.D. Cent. Code § 54-44.4-08 (1997); Or. Rev. Stat. § 279.630 (1997) (recycled and recyclable); 53 Pa. Cons. Stat. § 4000.1511 (1999); S.D. Codified Laws 5-23-22.4 (Michie 1998); Tenn. Code Ann. § 68-211-606 (1998); Tex. Gov't Code Ann. § 2155.446 (West 1998); Utah Code Ann. § 63-56-20.7; Va. Code Ann. § 11-47.2.

[27] *E.g.*, Colo. Rev. Stat. Ann. § 8-19.5-101 (West 1998) (plastics); Conn. Gen. Stat. Ann. § 4b-51a (West 1998) (construction materials); Idaho Code § 40-707 (1998) (highway construction and maintenance); 58 Pa. Cons. Stat. § 479 (1999) (oil products); Tex. Gov't Code Ann. § 2155.447 (West 1998) (oil products).

[28] *E.g.*, D.C. Code Ann. § 6-3413 (1998); N.Y.C. Admin. Code § 6-122 (1998); City of Richmond Code (Virginia) § 22-4 (1993).

[29] Columbus, Ohio has an ordinance requiring street signs to be made from recycled materials. Eleanor Lewis & Eric Weltman,

and fences,[30] to ordinances creating a general preference for recycled materials.[31] Other environmental procurement measures at the state and local level aim to reduce dependence on petroleum-based products. These include nine states with price preferences for soybean-based ink,[32] five states with statutes requiring bio-based or clean alternative fuel for governmental motorized vehicles,[33] and a variety of statutes and ordinances requiring energy efficiency to be taken into account in procurement decisions.[34]

Government Buying Can Save Tax Dollars and the Environment, Int'l City-County Mgmt. Ass'n, Feb. 1993, at 2.

30 Chicago recently adopted an ordinance with a purchasing preference for playgrounds, park benches and fences made from recycled plastic. Alice Horrigan, *Choosing to Recycle—Because it Pays*, E, Mar. 13, 1997.

31 *E.g.*, Baltimore County Code § 15-91 (1988); Itasca County, Minnesota, *see* Lewis & Weltman, *supra*, King County, Washington, *see* Richard Keller, *Buying Recycled: Investing Dollars to Close the Loop*, World Wastes, Jan. 1994; City of Los Angeles Admin. Code, art. 6, § 10.32 (1998); Newark, New Jersey, *see* Lewis & Weltman, *supra*.

32 Ark. Code Ann. § 18-11-102 (Michie 1998); 30 Ill. Comp. Stat. 500/45-15 (West 1998); 50 Ill. Comp Stat. 520/10 (West 1998) (local government purchases and contracts); Ind. Code § 5-22-15-18 (1998); Iowa Code Ann. § 216B.3 (West 1998); Ky. Rev. Stat. Ann. § 57.035 (Banks-Baldwin 1997); Minn. Stat. Ann. § 16B.121 (West 1998); Mo. Ann. Stat. § 34.175 (West 1997); N.D. Cent. Code § 54-44.4-07 (1997); S.D. Codified Laws § 5-23-37 (Michie 1998). Iowa also has a preference for soybean-based hydraulic fluids. Iowa Code Ann. § 307.21 (West 1998).

33 Cal. Educ. Code § 17911.5 (West 1998) clean fuel school buses); Conn. Gen. Ann. § 4a-59 (West 1998) (clean alternative fuel); Ind. Code § 5-22-15-19 (1998) (soy diesel, bio-diesel); Iowa Code Ann. § 18.18 (West 1997) (minimum ethanol requirements and alternative methods of propulsion); Wash. Rev. Code Ann. § 43.19.637 (West 1998) (clean fuel motorized vehicles).

34 The statutes include Ariz. Rev. Stat. Ann. § 34-455 (buildings) (West 1998); Conn. Gen. Stat. Ann. § 16a-38 (West 1998) (lifecycle cost analyses in major capital projects); Minn. Stat. Ann. § 216C.19 (West 1998) (roadway lighting; N.H. Rev. Stat. Ann.

Another type of state and local environmental procurement policy is a limit on tropical hardwood purchases. To date, three states and nine cities have passed laws that limit the purchase of wood from tropical rainforests, only buying tropical timber that is harvested using ecologically sound management practices.[35]

In addition to environmental objectives, local governments have also used their purchasing power to promote fair labor practices. Dozens of cities and counties—including Pittsburgh, Cleveland, North Olmstead (OH), and San Francisco—have laws banning the procurement of products made in sweatshops.[36] Similarly, nearly two

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§ 21-I:19-a (1997) (buildings); Or. Rev. Stat. § 276.915 (1997); Tex. Gov't Code Ann. § 2166.403 (1999); Vt. Stat. Ann. tit. 3 § 2291 (1998); Wis. Stat. § 16.847 (1998). New York City requires government purchases of motor vehicles to be low emissions vehicles. N.Y.C. Admin. Code § 6-121 (1998). Austin, Texas has a purchasing preference for solar electric systems, *see* Lewis & *Weltman*, *supra*, while San Jose, CA requires streetlights to be energy efficient, and Phoenix, Arizona requires energy efficiency in all municipal building lighting, *see Id.*

35 Ariz. Rev. Stat. Ann. § 34-201 (West 1998); N.Y. State Fin-Law § 165 (McKinney 1998); Tenn. Code Ann. § 4-3-1112 (1998); Baltimore, Maryland, Ord. No. 635 (passed 1991), *see* John Javna, *Now let's remind your rep: Rally behind recycling bill*, Atlanta J. and Atlanta Const. Mar. 24, 1991, *available in* 1991 WL 7779914; Bellingham, Washington, Resolution No. 43-90 (passed Aug. 1990); Berkeley, California (tropical hardwoods, redwoods) (Renee Koury, *Endangered Timber Banned in Berkeley*, L.A. Daily News, Oct. 30, 1995, *available in* 1995 WL 5424835); Los Angeles, California, *see* Tracey Kaplan, *Children Get City to Bar Hardwoods*, L.A. Times, Oct. 9, 1991 *available in* 1991 WL 2221464; Long Beach, California, *see* "Tropical Timber Trade Restrictions," Rainforest Relief (Jan. 27, 1999 facsimile); San Francisco, Ordinance No. 391-90; Santa Clarita, California, *see* Kaplan, *supra*; Santa Monica (California) Mun. Code, ch. 2.28; Ventura, California, *see* Tina Daunt, *Ventura City Hall Joins Boycott of Hardwoods*, L.A. Times, Mar. 17, 1992, *available in* 1992 WL 2937933.

36 *See* U.S. Newswire, *Pittsburgh Joins City Fight Against Sweatshops* (Sept. 23, 1998); Linda Himelstein, *Going Beyond City Limits? Muncipalities Are Exercising Their Clout on Social Issues —And Business is Balking*, Bus. Wk. (July 7, 1997).

dozen cities require companies receiving municipal contracts to pay their employees a "living wage."[37] The constitutionality of all of these laws is placed in doubt and subject to challenge based upon the Court of Appeals' ruling that market participation measures are subject to the self-executing limits of the federal foreign affairs power and the foreign commerce clause.

V. BECAUSE IT IS CONSISTENT WITH FEDERAL LAW AND POLICY, THE MASSACHUSETTS LAW SHOULD BE UPHELD ABSENT EXPLICIT CONGRESSIONAL PREEMPTION, WHICH HAS NOT OCCURRED

Where, as in matters of human rights policy in foreign affairs, the states and federal government have worked out a constitutionally appropriate means of dividing authority and limiting inappropriate state intrusions, it would be disruptive and imprudent for the courts to intervene.

In the effort to give substance to the U.S. policy of promoting human rights, the states have served as a "laboratory." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting). State practice has explored various means to achieve the federally endorsed goal. In the case of the Burma Law, the state is acting consistently with its own traditional powers and U.S. obligations under international law. Moreover, by enabling local initiatives in the realm of human rights, through its closer proximity to the citizen, the state is giving effect to another important aspect of international human rights law expressed in treaties ratified by the United States, namely the recognized duty of individuals to "strive for the promotion and observance" of human rights. International Covenant on Civil and Political Rights, pmbl. para. 5, art. 5(1).

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[37] Yumi Wilson, *S.F. Sets Up 15-Member Panel to Study Effect of Living-Wage Law.* S.F. Chron. A23 (Nov. 24, 1998) available at 1998 WL 3928728.

The U.S. Congress has demonstrated a keen awareness and capacity to respond to state initiatives. *See, e.g.*, *Amici Curiae* Brief of Members of Congress. At times, the federal government has endorsed and even followed the example of state and local action. At other times, the federal government has resolved to preempt the state action, leaving no question that state and local entities are excluded from participating in that aspect of foreign policy. For example, when the United States adopted legislation to counter the Arab League's boycott of Israel, Congress expressly preempted existing state legislation and occupied the field. Export Administration Act of 1979, 50 U.S.C. § 2401-2420 (1994 & Supp. III 1998). In contrast, when adopting the Comprehensive Anti-Apartheid Act of 1986, Congress did not do so. Lewis at 471-472.

This is consistent with many other areas of foreign affairs where in recent years of fast-accelerating globalization, the give and take between federal and state governments has yielded to a level of state involvement in foreign affairs that would have been unimaginable 30 years ago. *See, generally*, § IV, *supra.* For example, despite severe constitutional limitations (U.S. Const. Art. 1 sec. 10 (3)), "all states have entered into international agreements accords or pacts with national or sub-national governments abroad." Fry at 73.

In this context, it would be highly destructive to the federal-state relationship to strike down all those laws that produced more than an "incidental" effect on foreign affairs. *NFTC*, 181 F.3d at 53 (applying the standard of *Zschernig v. Miller*, 389 U.S. 429 (1968)). It would, furthermore, engage the court in a diplomatic and political, rather than a legal inquiry, to determine whether such laws were likely to create untoward embarrassment

as opposed to the embarrassment that is a function of policies like the promotion of human rights.[38]

By enacting the federal Burma statute, Pub. L. No. 104-208, § 101(c), Congress has answered the question of whether this is an issue on which, as a matter of foreign policy, the U.S. is prepared to accept possible embarrassment. Moreover, Congress may intervene at any time to preempt such a law. This is in marked contrast to other forms of state action in foreign affairs, such as ad-hoc state measures and "sense resolutions" which Congress has no power to stop. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION at 164 (note). There is thus further justification for allowing the political process to determine the outcome.

CONCLUSION

If a state law is consistent with important international obligations, as in the present case of Massachusetts' Burma Law, Congress and the Executive should be left to determine whether the particular means employed by the state should be maintained. As Congress has demonstrated its willingness to do this in the past, and as there exists no impasse that prevents their acting in this case, the Burma Law should be left to stand.

Thus, the Court should overturn the decision of the Appeals Court in order to affirm the rights of States to legislate in accordance with international human rights law and principles, and alleviate the uncertainties about existing laws and regulations created by the Appeals Court's decision.

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[38] Governments are rarely known to welcome scrutiny of their human rights records. It is well known in U.S. diplomatic circles, for example, that every February when the Congressionally mandated Human Rights Country Conditions Reports are published U.S. envoys are subject to a barrage of criticism that frequently disrupts other foreign policy goals. Such criticism sometimes comes even from our close allies.

Respectfully submitted,

DEBORAH ANKER
Counsel of Record
HARVARD IMMIGRATION &
REFUGEE CLINIC
197 Friends Street - Suite 800
Boston, MA 02114
(617) 371-1234

On the Brief,
DEENA HURWITZ
PETER ROSENBLUM

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Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

ROBERT BRAUNEIS
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6138

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Amici will address the following question:

Whether the Massachusetts Burma Law violates the Foreign Commerce Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that concern state and local governments, including issues of the allocation of state and federal powers that affect foreign relations and foreign commerce.[1] This case, involving a challenge to a Massachusetts law entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)," ch. 130, 1996 Mass. Acts 239 (codified at Mass. Gen. Laws ch. 7, §§ 22G-22M) (the "Massachusetts Burma Law," presents three related issues in that area: whether federal law preempts the Massachusetts law; whether the law violates the Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3; and whether the law runs afoul of the federal foreign affairs power. *See Zschernig v. Miller*, 389 U.S. 429 (1968) (recognizing such a power). For reasons stated at the beginning of the Argument section below, this brief will address only the Foreign Commerce Clause issue.

The question whether the Massachusetts Burma Law is unconstitutional is of fundamental importance to *amici*. *See* Pet. App. 10a (noting that municipal governments have enacted similar purchasing laws). The public procurement activities governed by the Burma Law are traditional exercises of the power of state and local governments to spend their lawfully gathered resources in accordance with the wishes of their citizens. *Amici* respectfully submit that the Constitution permits States and munici-

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

palities to refrain from using public funds in ways that they believe support persistent, egregious, and well-documented human rights violations by foreign governments.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

The Massachusetts Burma Law does not run afoul of this Court's dormant Foreign Commerce Clause doctrine. It does not offend either of the policies that are common to this Court's analysis under the Domestic and Foreign Commerce Clauses: it is neither in purpose nor effect economically protectionist, and it is not an attempt to regulate extraterritorial conduct. Neither does it conflict with the policy particular to the dormant Foreign Commerce Clause, the preservation of the federal government's ability to "speak with one voice" on foreign commercial relations.

Central to the constitutionality of the Massachusetts Burma Law is the fact that it concerns an exercise of the proprietary, noncoercive power to determine the disposition of public funds rather than an exercise of the States' coercive governmental powers of regulation or taxation. This feature of the Burma Law renders it constitutional under two independent components of dormant Commerce Clause analysis.

1. As an exercise of the power to direct the uses of the public fisc without an economically protectionist motive or effect, the Burma Law fits within the Court's "market participant" doctrine. Because the Burma Law neither links an exercise of the spending power to a targeted tax in a manner likely to endanger Commerce Clause values, nor leverages the State's spending power in the service of

economic protectionism, it does not fall into either of the exceptions to the market participant doctrine recognized by this Court. Contrary to the reasoning of the court of appeals, the protection of the market participant doctrine cannot be limited to proprietary actions motivated by economic self-interest, but rather must extend to actions based on ethical concerns. The rationales underlying the market participant doctrine—the self-limiting character of state proprietary actions, their importance to state sovereignty, and their lack of interference with federal regulation of private interstate and foreign commerce, which constitutes the great bulk of that commerce—make it fully applicable to Foreign Commerce Clause analysis.

2. Although the Massachusetts Burma Law facially discriminates against foreign commerce, its discrimination "is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988). The law therefore does not violate the Commerce Clause regardless of its qualification under the market participant doctrine. The clearest "valid factor" or "legitimate local purpose," *New Energy Co.*, 486 U.S. at 278, is the State's interest in ensuring that public funds are not used to support morally offensive practices of the Burmese government, whether or not withholding those funds leads to reform or communicates disapproval to the relevant Burmese officials. That legitimate interest in the use of state funds is not related to economic protectionism, and "cannot be adequately served by reasonable nondiscriminatory alternatives," *id.*, because any attempt to avoid supporting morally offensive practices perpetrated by a foreign regime must identify that regime.

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW DOES NOT VIOLATE THE FOREIGN COMMERCE CLAUSE BECAUSE IT ADDRESSES THE COMMONWEALTH'S ACTIVITIES AS A MARKET PARTICIPANT

Amici agree with petitioners that federal law clearly does not preempt the Massachusetts Burma Law, so that the Court will have to address the constitutional issues presented in this case. *Amici* also believe that this Court's analysis of state law that affects foreign commercial relations should and will be conducted under the Commerce Clause, which explicitly grants Congress the power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. Whatever may be the scope of the nontextual "foreign affairs power" in areas of foreign relations outside of the commercial realm, *see Zschernig v. Miller*, 389 U.S. 429 (1968), there is no reason to give it any scope at all when addressing foreign commercial relations, because the powers of federal and state governments in that area are governed by an express constitutional provision. *Cf. Graham v. Connor*, 490 U.S. 386, 395 (1989). Since the Massachusetts Burma Law is concerned exclusively with Massachusetts' commercial relations with companies doing business with or in Burma, it falls within that category of state law subject to analysis under the Commerce Clause. This brief will therefore address only the question whether the Massachusetts Burma Law is invalid under this Court's dormant Foreign Commerce Clause doctrine.

The Massachusetts Burma Law does not violate the Foreign Commerce Clause because it addresses a proprietary activity—the State's determination of how it will spend its own lawfully collected funds. As this Court has articulated in its "market participant" doctrine, such activ-

ity is generally not subject to dormant Commerce Clause scrutiny, and the Burma Law does not fall within either of the two exceptions to that rule. The rationales underlying the market participant doctrine make the doctrine fully applicable in the Foreign Commerce Clause context.

A. The Market Participant Doctrine Applies To The Massachusetts Burma Law's Conditions On Public Procurement

The Massachusetts Burma Law sets guidelines for the Commonwealth and its agencies to follow while they are exercising their noncoercive spending power. The guidelines do not create any identified risk of protectionism. Together, those features qualify the Burma Law for protection under this Court's market participant doctrine. That doctrine recognizes that Congress's Commerce Clause power does not need prophylactic protection from a State's choices about how to exercise its noncoercive power to distribute its lawfully gathered resources, as long as those choices do not present a particular, identified risk of protectionism.

1. At the core of the powers granted Congress by the Commerce Clause is the power to invalidate or negate state laws that, in Congress's judgment, unduly hinder interstate or foreign commerce. This is the original meaning of the "negative" Commerce Clause. *See, e.g.*, 3 M. Farrand, *Records of the Federal Convention of 1787*, 478 (1911) (Letter of James Madison) (the Commerce Clause "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the Federal Government"). Over the past one-and-a-half centuries, this Court has developed its own prophylactic "negative" or "dormant" Commerce Clause doctrine, under which the Court itself invalidates some of the most serious

state-law challenges to the free market values that the Commerce Clause granted Congress the power to promote, while leaving Congress the power explicitly to sanction such laws. *See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945) (recognizing that, while the Commerce Clause limits state power even absent Congressional legislation, Congress has "undoubted" power to "permit the states to regulate the commerce in a manner which would otherwise not be permissible").

This Court has decided scores of dormant Commerce Clause cases over the last 150 years. But until 1976 it was not asked to decide whether an exercise of a State's proprietary functions—its power to spend state funds or dispose of state property—ran afoul of dormant Commerce Clause doctrine, even though over that period States routinely discriminated against interstate and foreign commerce while spending and disposing of property in ways that would have violated core dormant Commerce Clause doctrine had that discrimination accompanied exercises of state powers to tax or regulate. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976); *id.* at 817 (Stevens, J., concurring) ("[T]here must have been countless situations during the past two centuries in which the several States have experimented with differing methods of encouraging local enterprise without providing like encouragement to out-of-state competitors."); *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n. 9 (1980) (citing numerous state court decisions from 1898 onwards holding that state proprietary functions were not subject to dormant Commerce Clause scrutiny).

The explanation for the tacit agreement that spending power exercises do not ordinarily raise dormant Commerce Clause concerns rests on the distinction between a State's coercive sovereign powers and its noncoercive proprietary powers, and on the full applicability of the dormant Commerce Clause to its coercive powers. When States decide how to spend state funds and dispose of state property, they are not exercising any distinctive sovereign powers, but rather are exercising the same property rights as they recognize in private individuals and businesses.[2] To be sure, States usually acquire property through the coercive sovereign power of taxation, which distinguishes them from private parties. That power of taxation, however, is fully subject to dormant Commerce Clause strictures. Thus, the funds over which a State has proprietary discretion have been gathered through taxes that do not discriminate against interstate or foreign commerce, and the bulk of those funds are ordinarily gathered from the same state residents who, through their legislators, decide how to use those funds.

Once it is determined that state funds have been gathered in an evenhanded manner falling largely on participants in the state political process, dormant Commerce Clause concerns have usually been satisfied. Absent special, limited circumstances, a State, " '[l]ike private individuals and businesses, . . . enjoys the unrestricted

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[2] This distinction was muddied by the 19th-century legal fiction, since discarded, that States "owned" all natural resources within their jurisdictions. *See Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) (holding that state regulation of wild animals should be governed by ordinary Commerce Clause analysis, and overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)). The Massachusetts Burma Law does not concern natural resources, however, but funds to which the State has title in the same way that a private Massachusetts resident would.

Of course, property rights are themselves enforced by coercive sovereign powers, but the powers of disposal granted proprietors under state property law normally include a realm of discretion that does not draw any distinction between domestic and foreign jurisdictions. Needless to say, state property law that discriminates without justification against interstate or foreign commerce is fully subject to invalidation under dormant Commerce Clause doctrine.

power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.'" *Reeves*, 447 U.S. at 439 n. 12 (1980) (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)) (emphasis deleted). The policy grounds underlying the recognition of this "unrestricted power" include both respect for the role of each State "'"as guardian and trustee of its people,"'" *Reeves*, 447 U.S. at 438 (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915) (quoting *Atkin v. Kansas*, 191 U.S. 207, 222-223 (1903))), and acknowledgment that spending power discrimination is self-limiting, because it relies on the legislature's ability and willingness to assess taxes on participants in the state political process. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (noting that evenhanded taxes are generally upheld in part because "'[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse'") (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n. 17 (1981)); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 184 n. 2, 187 (1938).

Since 1976, this Court has articulated the longstanding tacit approval of discriminatory spending power exercises as the "market participant" doctrine. *See Hughes*, 426 U.S. at 810; *Reeves*, 447 U.S. at 436; *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 215 (1983). This doctrine covers a wide variety of exercises of the power to spend funds and dispose of property, including purchasing goods and services, *see White*, 460 U.S. at 205-06 (financing public construction projects on the condition that 50% of construction workers be city residents), selling state-owned property, *see Reeves*, 447 U.S. at 431-32 (preferring state residents in selling a limited supply of cement from a state-owned

plant), and subsidizing local businesses, *see Hughes*, 426 U.S. at 801 (providing "bounties" for the delivery of inoperable automobiles to scrap processors on easier terms to in-state than out-of-state processors).

The public procurement activities governed by the Massachusetts Burma Law fall squarely within the scope of the market participant doctrine. They are traditional exercises of a State's power to determine how to spend its lawfully gathered resources.

2. In the last fifteen years, this Court has also for the first time struck down spending power exercises on Commerce Clause grounds. It did so in two narrow circumstances in which those exercises presented an acute risk of undermining core Commerce Clause values because they were not self-limiting as spending power exercises usually are. The Massachusetts Burma Law does not create any such condition.

In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), this Court held that a Massachusetts subsidy to Massachusetts dairy farmers violated dormant Commerce Clause doctrine because the subsidy was directly linked to and funded by a tax on all milk sold in Massachusetts. The Court noted that such a subsidy "funded out of general revenue ordinarily imposes no burden on interstate commerce." *Id.* at 199. The linkage of subsidy and targeted tax, however, insulated the tax from the normal political processes that would keep it in check, and thus created a concentrated threat to Commerce Clause values: "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." *Id.* at 200.

Second, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the Court held that a sale of state-owned timber conditioned on the purchaser processing the timber before shipping it out of the State violated the Commerce Clause because the State was using its power to dispose of public property to favor intrastate commerce in a manner that risked circumventing the self-limiting quality of that power. The *South-Central Timber* plurality concluded that Alaska was attempting to leverage its ownership of timber by "govern-[ing] the private, separate economic relationships of its trading partners," *id.* at 99 (plurality opinion), in order to encourage " 'business operations to be performed in the home State that [might] more efficiently be performed elsewhere.' " *Id.* at 100 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)).

This was, the plurality reasoned, a type of burden on commerce that the Court has " 'declared to be virtually *per se* illegal.' " *Id.* (quoting *Pike*, 397 U.S. at 145). The Court had previously questioned a similar leveraging technique in dictum in *White* when it noted that the residency requirement in that case "does not represent the sort of 'attempt to force virtually all businesses that benefit in some way from the economic ripple effect' of the city's decision to enter into contracts for construction projects 'to bias their employment practices in favor of the [city's] residents.' " *White*, 460 U.S. at 211 (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978)). Here, the presumed vice of Alaska's law was that through leveraging it created a protectionist effect greater than a simple subsidy would, and thus did not limit the quantum of economic favoritism to that for which local taxpayers were willing to pay.[3]

[3] *Amici* do not necessarily agree that the law in *South-Central Timber* actually had such a disproportionate effect, or that *South-Central Timber* was correctly decided, but assume that it was correctly decided for purposes of this argument.

The Massachusetts Burma Law does not present either of these two kinds of threats. The Burma Law obviously does not create a tax/subsidy linkage of the type the Court struck down in *West Lynn Creamery*.

The court of appeals' heavy reliance on the *South-Central Timber* plurality and the dictum in *White*, *see* Pet. App. 43a-45a, is also misplaced. Not only does the Burma Law not produce leveraged economic favoritism of the type the Court disapproved of in *South-Central Timber*, it does not produce *any* economic favoritism at all. There is no identifiable group of Massachusetts political participants that is economically benefited by the Massachusetts Burma Law. If Massachusetts rejects a low bid from a company with Burmese connections due to Burma Law procurement restrictions, Massachusetts taxpayers suffer because they must pay more for the goods or services at issue; Massachusetts beneficiaries of public projects suffer because the projects are more likely to be eliminated or scaled down due to higher costs; and Massachusetts businesses suffer because they, like out-of-state businesses, must choose between doing business with Burma and doing business with the Commonwealth of Massachusetts.[4] In other words, as developed more fully

[4] There are apparently more foreign companies than United States companies on Massachusetts's "restricted purchase list" of all firms engaged in business with Burma. *See* Pet. App. 10a (at the time respondent filed its complaint, forty-four of 346 companies on the restricted purchase list were United States companies). This fact, however, does not demonstrate that Massachusetts businesses are favored by the Burma Law. Many of the foreign companies engaged in business with Burma undoubtedly have operations limited to southeast Asia or other parts of the world outside the United States and have never desired to engage in business with the Commonwealth of Massachusetts; to *amici*'s knowledge, there is no evidence in the record concerning the num-

below, the Massachusetts Burma Law is simply not an economically protectionist law, which cleanly distinguishes it from the law struck down in *South-Central Timber*.

The unduly formalistic language in the *South-Central Timber* plurality opinion that influences some of the court of appeals' reasoning about the "regulatory" character of the Massachusetts Burma Law, *see* Pet. App. 43a-44a, is, if read literally, simply mistaken. In one passage, the *South-Central Timber* plurality seems to suggest that, while Alaska acted as a proprietor exercising its non-coercive power to dispose of its property as long as it imposed only contractual conditions relating directly to the transaction in which it was disposing of the property, it became a government exercising its distinctive coercive power of regulation the moment it imposed unrelated conditions on such a disposition. *See South-Central Timber*, 467 U.S. at 97-99 (plurality opinion) (distinguishing between Alaska's roles as "market regulator" and "market participant").

This makes no sense. A private owner disposing of property does not suddenly exercise sovereign powers when he imposes unrelated conditions on that disposition.[5]

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ber of foreign and domestic companies that have actually submitted or desired to submit bids on Massachusetts projects, either before or after the passage of the Burma Law. Of course, there has never been the slightest suggestion that the Massachussetts Burma Law was motivated in any part by a desire to favor Massachussetts companies.

[5] The *South-Central Timber* plurality cites as a major inspiration for its decision to invalidate economically protectionist leveraging the antitrust law limitation on vertical restraints. *See South-Central Timber*, 467 U.S. at 98 (plurality opinion); *see also White*, 460 U.S. at 219 n.4 (Blackmun, J., concurring in part and dissenting in part) (similarly referring to the antitrust vertical-restraint limitation). Antitrust law, however, does not limit vertical restraints because they are invalid attempts by private parties to

He is still acting as a proprietor, and so was the State of Alaska in *South-Central Timber* when it conditioned a sale of state-owned timber on in-state processing but did not attempt to force in-state processing of privately owned timber. The *South-Central Timber* plurality's use of the terms "market regulator" and "market participant" only make sense as shorthand for types of proprietary actions that do and do not create a special danger to Commerce Clause values. Because the Massachusetts Burma Law creates no special danger to those values, there is no reason for this Court to invalidate it as "market regulation."

Finally, the court of appeals erred on two levels when it reasoned that Massachusetts's refusal to do business with companies involved in Burma could not be classified as market participation because "ordinary" private market participants would not so act. The court stated:

> Even if certain companies ceased purchasing goods from companies that maintain investments in Burma, such a fact would not be sufficient to lead us to consider the Massachusetts Burma Law to be market participation. The proper inquiry is whether Massachusetts is acting as an ordinary market participant would act, not whether any participant has acted in such a fashion.

Pet. App. 48a. Surely, however, the proper inquiry is whether a private market participant *could* act as Massachusetts has, not whether statistics would show that the average private market participant has or has not so acted. A freedom that is exercised infrequently may be nonetheless an important freedom, precisely because it

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exercise a coercive sovereign power of regulation; it limits vertical restraints because they endanger the values and policies underlying antitrust law. In the same way, the only intelligible ground of the ban on economically protectionist leveraging is the danger it poses to Commerce Clause values.

becomes crucial only in egregious cases that are themselves rare.

Moreover, it is simply incorrect to assert, as the court of appeals did, that the "ordinary market participant" rarely if ever breaks off ties with a company due to ethical objections to that company's dealings. For example, investors are quintessential ordinary market participants, yet in 1999 American investors had over $2.16 trillion in "socially responsible" investment funds that used some guideline other than raw profit to limit their investments in companies. *See* Social Investment Forum, 1999 Report on Socially Responsible Investing Trends in the United States (1999), http://www.socialinvest.org/areas/research/trends/1999-Trends.htm. That figure represents over one-eighth of the total $16.3 trillion in investment assets under management in the United States. *See id.* Thus, the court of appeals' assumption that sensible private market participants virtually never take ethical considerations into account is simply wrong, further undermining the notion that the market participant doctrine should protect actions motivated by pure greed but not actions stemming from moral concerns. The Massachusetts Burma Law falls squarely into the realm of spending power discretion recognized by this Court under the market participant doctrine, and should for that reason pass dormant Commerce Clause scrutiny.

B. The Rationales Underlying The Market Participant Doctrine Make It Fully Applicable To Foreign Commerce Clause Analysis

This Court has at times suggested that Foreign Commerce Clause scrutiny is more rigorous than Domestic Commerce Clause scrutiny. It has stated that it will consider an additional factor under the Foreign Commerce Clause, namely whether the law "prevents the Federal

Government from 'speaking with one voice when regulating commercial relations with foreign governments.' "[6] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)); *see also South-Central Timber*, 467 U.S. at 100 (plurality opinion) (same). It has also stated that it will generally look more closely at state laws touching on foreign commerce. *See, e.g., id.* at 96 (plurality opinion). Citing these statements, the court of appeals expressed its skepticism "of whether the market participation exception applies at all . . . to the Foreign Commerce Clause." Pet. App. 48a.

The court of appeals' skepticism is unwarranted. The rationales underlying the market participant doctrine are equally applicable in domestic and foreign contexts, and the doctrine should be given full effect in Foreign Commerce Clause analysis. The "one voice" language used in *Japan Line* and *South-Central Timber* employs a striking metaphor, but applied as a test within dormant Foreign Commerce Clause analysis, it is misleading and largely unhelpful, because it ultimately rests on a categorical understanding of the dormant Commerce Clause that this Court long ago rejected.

Under one literal interpretation of the "one voice" language, the test is so permissive as to be utterly ineffectual. There is not a single state law that actually *prevents* the federal government from "speaking with one voice" when regulating foreign commerce. The Foreign Commerce Clause fully empowers Congress both to pass positive regulations of foreign commerce that will

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[6] *Japan Line* states that where a state tax is at issue, a court must also inquire "whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation." 441 U.S. at 451. This factor is obviously particular to state taxation, and cannot be applied to state regulation or spending.

preempt any inconsistent state laws, and to negate or invalidate state laws affecting foreign commerce that in its judgment do not advance the foreign policy interests of the United States.

Under the other plausible interpretation of the "one voice" language, the test is impossibly strict. Dormant Foreign Commerce Clause doctrine cannot possibly lead to the invalidation of every state law that could *potentially* conflict with Congress's judgment about the proper conduct of foreign commercial relations, with the goal of preserving for Congress a pristine slate on which to write foreign commercial policy. The early nineteenth-century view that Congress and the States possessed exclusive, non-overlapping powers over, respectively, interstate and local commerce soon fell to the reality of economic integration, which left little room for "exclusively local" or "exclusively interstate" commerce. As this Court noted in *Southern Pacific Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761 (1945), "[e]ver since *Willson v. Black-Bird Creek Marsh Co.,* [27 U.S.] 2 Pet. 245 (1829), and *Cooley v. Board of Wardens,* [53 U.S.] 12 How. 299 [(1851)], it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co.,* 325 U.S. at 766-67. In today's global economy, it is equally impossible to maintain a categorical distinction between local and foreign commerce. Indeed, the Massachusetts Burma Law would have no application unless there were companies that wished to do business in both Boston and Rangoon, cities that are on opposite sides of the earth.

Thus, dormant Foreign Commerce Clause doctrine, like dormant Domestic Commerce Clause doctrine, must rest

on this Court's pragmatic judgment about which type of state actions deeply and persistently conflict with national interests, while having little connection to traditional legitimate state interests. The ordinary exercises of a State's powers to spend and dispose of property that fall under this Court's market participant doctrine are among the least likely to so challenge national interests.

First, as argued above, spending power exercises are ordinarily self-limiting, because they depend upon state residents' willingness to tax themselves. For example, to date the most widespread movement of state and local governments to refrain from financial participation in morally offensive practices of a foreign government was undoubtedly that associated with protests against South African apartheid. Yet although at that movement's height some 140 state and local governments had some policy restricting the use of public funds relating to South Africa, *see* Earl H. Fry, "The US States and foreign economic policy: federalism in the 'new world order,'" in *Foreign Relations and Federal States* 122, 134 (Brian Hocking, ed. 1993), they were a fraction of the 83,000 state and local governments then existing in the United States. *Id.* at 123-24. The measures were enacted only in those jurisdictions in which constituents cared enough about the issue to accept the risk of increased costs or lower returns on investment.

At the same time, as more fully developed below, a State's power to determine the use of its public resources is at the core of state sovereignty. This is particularly true when, as in the case of the Massachusetts Burma Law, the state funds at issue are presumably being used to provide ordinary, traditional state services, and the global nature of commerce forces the State to decide whether in providing these services it should be supporting morally offensive practices in foreign jurisdictions.

Of course, foreign governments that do not understand American federalism may occasionally misattribute proprietary actions of a state or local government to the federal government, and conclude that such actions are a reflection of official United States policy. These misattributions, however, should hardly lead this Court to prohibit the state actions. After all, foreign governments that do not understand the freedoms enjoyed by American citizens may also misattribute the actions of private individuals to the federal government, yet such misattribution would not provide sufficient grounds for curtailing First Amendment protections of freedom of speech.

Finally, since a State's decisions about how to use its own resources do not regulate private activity, there is no chance that those decisions will conflict with federal regulations governing private foreign commerce, which constitutes the bulk of foreign commerce. In other words, as this Court noted in *United Building and Construction Trades Council v. Camden*, 465 U.S. 208 (1984), "[w]hen the State acts solely as a market participant, no conflict between state regulation and federal regulatory authority can arise." *Id.* at 220 (emphasis deleted). The *Camden* Court went on to hold that the market participant doctrine did not apply to the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, because that clause, unlike the Commerce Clause, "imposes a direct restraint on state action in the interests of interstate harmony." *Id.* Its remarks about the market participant doctrine in the Commerce Clause context, however, apply equally to the Foreign and Domestic Commerce Clauses, and therefore support the full recognition of the doctrine in the Foreign Commerce Clause context.

In sum, the market participant doctrine is as essential in the context of dormant Foreign Commerce Clause analysis as in dormant Domestic Commerce Clause analysis,

and there is no reason for this Court categorically to distinguish between the two. It is not clear what is to be gained by applying some indeterminately "more rigorous" scrutiny in Foreign Commerce Clause analysis than in Domestic Commerce Clause analysis.[7] *See Reeves*, 447 U.S. at 437 n.9 (suggesting that scrutiny of state proprietary activities may "well be more rigorous when a restraint on foreign commerce is alleged"). If, however, this increase in rigor means that spending power exercises on the edges of the "linked tax/subsidy" and "leveraged economic favoritism" exceptions to market participant doctrine are more likely to be invalidated under those exceptions, then the closer scrutiny will not affect the Massachusetts Burma Law, because it falls nowhere near those exceptions.

II. THE MASSACHUSETTS BURMA LAW DOES NOT VIOLATE THE FOREIGN COMMERCE CLAUSE BECAUSE IT ADVANCES A LEGITIMATE STATE PURPOSE THAT CANNOT BE ADEQUATELY SERVED BY REASONABLE NONDISCRIMINATORY ALTERNATIVES

Because the Massachusetts Burma Law restricts state purchases from companies that maintain certain specified

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[7] The Framers may well have envisioned that Congress would exercise its foreign commerce power to serve a more complex set of ends. The maintenance of a free international market may not be the sole dominating inspiration for the foreign commerce power in the same way that the maintenance of a free national market was the central inspiration of the interstate commerce power. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (stating that the interstate commerce power was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"). Yet in one sense that complexity counsels against a strong dormant Foreign Commerce Clause doctrine, because it is not as easy for courts to determine what mix of values should be served in the absence of Congressional action. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 328 (1994).

connections with a named foreign country, the law facially discriminates against foreign commerce. Even absent the market participant doctrine, however, facial discrimination will not be fatal under dormant Commerce Clause analysis if the "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988), or, in an alternative formulation, if the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 278. *See, e.g., Maine v. Taylor*, 477 U.S. 131 (1986) (upholding absolute ban on the importation of baitfish into Maine on grounds of disease prevention).

1. In this case, the law is completely unrelated to economic protectionism, as it confers no advantage on either local consumers or local merchants. *Cf. Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986) (dormant Commerce Clause doctrine concerned with both producer and consumer favoritism). The law imparts no economic benefit to the Commonwealth or its taxpayers. On the contrary, it forces the Commonwealth of Massachusetts to pay more for goods and services.

Nor does it impart any discernible economic benefit to Massachusetts producers. The law's restrictions apply to all companies that are "doing business with Burma," and thus apply equally to Massachusetts and non-Massachusetts companies maintaining a specified connection to Burma. And, of course, there is no evidence that any Massachusetts legislator believed that the law would favor Massachusetts businesses or supported the law for that reason. Thus, the law is not a " 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment." *New Energy Co.*, 486 U.S. at 278. To be sure, "the standards for . . . justification [of a facially

discriminatory enactment] are high." *Id.* Here, however, the complete lack of protectionist purpose or effect associated with the Massachusetts Burma Law renders it capable of meeting even those high standards.

2. In spite of the Massachusetts Burma Law's demonstrable lack of protectionist purpose or effect, the court below mistakenly held that it ran afoul of the Commerce Clause because it advanced no "local" purpose at all, and therefore advanced no " 'legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " *See* Pet. App. 57a-58a (quoting *New Energy Co.*, 486 U.S. at 274, 278). This conclusion is mistaken for two reasons.

First, this Court has distinguished between local and non-local purposes only when reviewing exercises of a State's coercive powers of taxation and regulation. For good reason, it has not extended the requirement of a specifically local purpose to exercises of a State's power to spend and dispose of property.

The local purpose requirement is closely tied to the Commerce Clause doctrine prohibiting state regulation where its " 'practical effect . . . is to control [conduct] beyond the boundaries of the state.' " *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945)). The prohibition on wholly extraterritorial regulation stems from the need to protect the sovereignty of other States, which would otherwise be hampered in their ability to enforce their regulatory choices about conduct in their own jurisdictions. *See id.; BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996) ("[I]t follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States."). A regulation that aims to protect parties

to wholly extraterritorial transactions does not have a "legitimate local purpose" because it encroaches on the regulatory prerogatives of other sovereign States. *See, e.g., Edgar,* 457 U.S. at 642, 644 (striking down an Illinois securities regulation that "could be applied to a tender offer which would not affect a single Illinois shareholder" while noting that "the State has no legitimate interest in protecting nonresident shareholders").

The exercise of a State's spending power, however, does not encroach on the prerogatives of other sovereigns in the way that an exercise of taxing or regulatory powers does. For example, an appropriation of state funds for disaster relief in another State or a foreign country that has suffered a natural calamity would seem to lack a "legitimate local purpose," in this Court's use of that phrase in regulatory contexts. Such funds would be put to wholly extraterritorial use, and would not directly benefit any resident of the donor State. Yet it seems unthinkable that such an appropriation would violate the federal constitution on the grounds that the negative Commerce Clause prohibits States from taking any interest in events beyond their borders. Rather, it becomes clear that the prohibition on extraterritorial purposes logically extends only to the use of a State's coercive powers.

Second, even if the "legitimate local purpose" requirement extends to exercises of a State's spending power, in this case there is a perfectly legitimate local purpose "that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278. As the First Circuit recognized, the Massachusetts Burma Law was motivated by "Massachusetts's desire to eliminate moral taint that it claims it suffers from dealing with firms that do business in Burma." Pet. App. 47a. This goal—to ensure that funds collected from Massachusetts residents are not used to support the "deplorable"

human rights conditions in Burma. Pet. App. 5a—must be carefully distinguished from two other potentially related but distinct goals. Once that distinction is made, it becomes clear that the legislation passes the test articulated in *New Energy Co.*

To begin with, the goal of refraining from supporting practices judged to be morally offensive is distinct from the goal of changing those practices. A refusal to do business with companies that are connected with Burma might also be justified on those latter "reform" grounds, as an attempt to induce Burma to change its morally offensive practices. Indeed, the legislative history of the Massachusetts Burma Law identifies this as one of the motivations cited by its supporters. *See, e.g.*, Pet. App. 9a (quoting statement by the bill's sponsor, Rep. Byron Rushing, that "the 'identifiable goal' of the law was 'free democratic elections in Burma' "). Yet, as Governor Weld noted, the Massachusetts Burma Law was unlikely to change the situation in Burma: "[o]ne law passed by one state will not end the suffering and oppression of the people of Burma." *Id.*

Nevertheless, regardless of the chances of inducing reform, Massachusetts did not want to act in a way that its legislators perceived as participating in wrongdoing. This is an utterly common, normal moral judgment. Moreover, it is a judgment that other state and local governments, in other situations, have made with regard to public funds. The Maryland Court of Appeals, for example, found that the "legitimate, local public interests" supporting the City of Baltimore's decision to withdraw city pension funds from investments in companies doing business in South Africa included "the local interest in . . . ensuring that pension funds are invested in a socially responsible manner [and the desire of] the City and its citizens to distance themselves from the moral taint of

coventuring in firms that, in the view of many, help to maintain South Africa's system of racial discrimination." *Board of Trustees of the Employees' Retirement System v. Baltimore*, 562 A.2d 720, 755 (Md. 1989).

The goal of refraining from supporting morally offensive practices is also distinct from that of expressing disapproval of such practices. Massachusetts might want to express disapproval of Burmese practices whether or not any of its budget could potentially be paid to companies doing business with Burma, and it could do so by means of resolutions or other official communications. Conversely, Massachusetts might want to refrain from using public funds in a way it believed would support Burma whether or not Burmese government officials ever learned of or paid any attention to its action, because it simply did not want to have state funds used in that manner. In this case, the record discloses both communicative and non-participation purposes underlying the Massachusetts Burma Law. *See* Pet. App. 9a (noting that Massachusetts's district court brief contended that one of the law's goals was to "express[] the Commonwealth's own disapproval of the violations of human rights committed by the Burmese government"). These purposes, however, are independent of each other.

The interest in avoiding use of public funds to support morally offensive practices, distinct from both reformist and communicative interests, is the clearest legitimate local interest that cannot be adequately served by any reasonable nondiscriminatory alternative. Although *amici* believe that the goal of encouraging reform of Burmese practices is perfectly legitimate so long as it is pursued through the spending power rather than the coercive powers of regulation and taxation, a broad reading of this Court's extraterritorial regulation cases may cast some doubt on the legitimacy of an interest in changing conditions in other States and countries. And although *amici* believe that no reasonable nondiscriminatory alternative would adequately serve the communicative purpose of expressing Massachusetts's strong disapproval of Burmese policy—a simple resolution, unaccompanied by any willingness to forego the economic advantages of accepting a lowest bid from a Burma-connected company, could not be taken as seriously—it might be argued that resolutions and other official pronouncements "adequately," if not perfectly, serve the interest of communicating disapproval.

The interest in refraining from supporting offensive practices in Burma suffers from neither of these arguable defects. Massachusetts has an undeniably legitimate interest in ensuring that its public funds are not used in support of practices that its residents find to be morally offensive. Indeed, Massachusetts presented a strong argument in the court of appeals that, in light of the respect accorded state sovereignty under the federal constitutional scheme, as reflected in the Tenth Amendment, the Foreign Commerce Clause does not even empower Congress to override the wishes of state residents to refrain from spending state funds in support of morally offensive practices. *See* Pet. App. 39a (citing *Printz v. United States*, 521 U.S. 898, 933-35 (1997) and *New York v. United States*, 505 U.S. 144, 178-80 (1992)). Whether or not Congress could pass affirmative legislation to this effect, there is no reason for this Court, in elaborating the more limited dormant Commerce Clause doctrine, to leap to the other extreme and require Congressional approval of States' attempts to set morally responsible spending policy.

The interest in ensuring that public funds not be used to support the current Burmese regime is also, in particular, a "legitimate *local* purpose." It must be presumed that the public funds subject to the Burma Law are being

used for quite ordinary, traditional state functions such as law enforcement, road building, education, welfare, public services, and so on, all quintessentially legitimate local activities. Due to the global nature of trade and business activities at the turn of the twenty-first century, when Massachusetts engages in public procurement to carry out these traditional state functions, it is forced to consider whether or not to do business with companies that its citizenry perceives as supporting regimes engaged in morally offensive practices. That choice is essentially a local choice in that it is made about funds collected locally and dispensed locally, while pursuing local interests, without any attempt to project the coercive powers of the State outside its boundaries.

3. There is no reasonable nondiscriminatory alternative to the Massachusetts Burma Law that would adequately serve Massachusetts's legitimate interest in ensuring that its public funds not be used to support the current regime in Burma. Hortatory resolutions alone utterly fail to serve this interest; it can only be furthered by a purchasing policy, and that policy must make some distinction between payments that would in the legislators' judgment be too directly connected to the Burmese government, and those that would have little or no connection. Massachusetts has chosen to draw this line to include companies that have a presence in Burma or do business with Burma. This line is not the only one that could be drawn, but it embodies a legislative judgment that is entitled to deference.

To be sure, viewed from one perspective, Massachusetts is "attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts." Pet. App. 45a. This attempt, so described, led the court of appeals to conclude that the

Burma Law was not protected by the market participant doctrine. Yet while a company's activities in Massachusetts and Burma may be operationally unconnected—the company may be supplying paper clips to one and radar equipment to the other, from two entirely different divisions—the Massachusetts Burma Law rationally assumes that the activities are financially connected. Profits and losses from the activities flow to the same entity, and revenues from the profitable supply of paper clips to Massachusetts might turn out to offset losses from radar equipment sales to Burma. This is precisely the connection that Massachusetts is attempting to avoid, and avoiding that connection cannot be accomplished by any reasonable nondiscriminatory alternative to the Massachusetts Burma Law. Thus, even absent the market participant doctrine, the Massachusetts Burma Law survives Commerce Clause scrutiny because "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ROBERT BRAUNEIS
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6138

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the *Amici Curiae*

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October Term, 1999

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONER

Kenneth B. Clark*
COALITION FOR LOCAL SOVEREIGNTY
611 Pennsylvania Ave, SE # 169
Washington, DC 20003
(301) 579 - 6100

* *Counsel of Record*

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STATEMENT OF CASE

The Commonwealth of Massachusetts has adopted a policy of giving preference in state contracts to companies which do not do business in Burma. Does a state or local government's decision to have purchasing decisions reflect the community's disapproval with the actions of domestic companies or foreign governments violate any constitutional restriction?

INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state and local officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, Commonwealth of Massachusetts, and counsel to the respondent, National Foreign Trade Council, have consented to the filing of this *amicus* brief.

SUMMARY

The traditional standard for determining the constitutionality of a local policy which has some effect on foreign countries was expressed quite clearly in *Clark v. Allard* (331 US 303) which ruled that the California statute being contested as an exercise of alleged foreign policy "will have some *incidental or indirect effect* in

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

The First Circuit decision, in effect, rejects this standard, ruling that a local law which has only "indirect effect" on foreign countries is unconstitutional. If upheld this new standard threatens "many state laws which none would [otherwise] claim cross the forbidden line."

The decision of the Appeals Court infringed upon the constitutionally protected autonomy of state and local government in several important areas:

1) The decision considers all matters "relating to foreign commerce" as areas of exclusive federal legislation. There are very few things (if anything) which is not in some way related to foreign commerce. Like the argument that anything the least bit "related to interstate commerce" is an area of federal jurisdiction, such a broad interpretation threatens to bring everything under federal jurisdiction and transform the federal government from one of limited jurisdiction into one of unlimited jurisdiction.

2) The decision takes an extreme position that the United States must "speak with one voice" and that state and local governments may not do anything which might be "embarrassing" to the United States on the international level. This reading threatens to undermine a whole host of activities traditionally carried on by local governments and their leaders. Sister-city and sister-state programs, unofficial negotiations of governors and mayors with foreign leaders for investment, and even state and local resolutions expressing the sense of the legislature on matters of international concern are all seemingly condemned by *NFTC*. Since Virginia and Kentucky passed Resolutions condemning the Alien and

Sedition Acts of 1798 it has been established that the states have an important role to play in the foreign policy debate. That local governments may make statements or take actions which are embarrassing to the US government is part of living in a free society.

3) The decision takes the radical step of suggesting that federal laws preempt local laws on the same topic, even when there is no contradiction between the two. With few exceptions, it has always been understood that state and local laws have force so long as they do not contradict a valid federal law. Such a radical interpretation threatens to seriously undermine the decision-making ability of local governments.

4) The First Circuit declares that "the Commonwealth has crossed the line from market participant to market regulator." Not only is this based on an absurdly stretched definition of "regulation" (on which the entire decision rests) but it threatens to undermine purchasing decisions of all sorts. For example, when state boards of education approve certain guidelines for textbooks (especially if it is a large state) book publishers invariably change the content of their books to conform. These same text books are usually sold to schools in other states. The NFTC decision would have us conclude that such actions constitute an impermissible attempt to "REGULATE conduct beyond its borders." The fact is that purchasing decisions by large consumers (whether states or large companies) affect production and distribution decisions in other states and other countries. An upholding of the position of the First Circuit could subject local governments to frivolous lawsuits for almost any purchasing decision.

ARGUMENT

I. Framers viewed the States as having an important role in the foreign policy debate and saw the foreign powers of the federal government as not extending to internal, domestic issues.

In 1798 when Congress passed the Alien and Sedition Acts, James Madison and Thomas Jefferson authored Resolutions in Kentucky and Virginia which declared that these Acts could not be enforced in either state. Many people at the time regarded these actions by the states as interference in foreign affairs that ought to be left up to Congress. While the Supreme Court never ruled on either the Acts or the Resolutions, the subsequent election of Jefferson and Madison to the presidency, and the judgement of history has been that they were right to oppose these Congressional excesses.

These resolutions also expressed the unequivocal view of Madison and Jefferson that, whatever powers the federal government might possess to engage in foreign policy, those powers did not extend to the regulation of affairs internal to the states themselves.

To cite just one example, Jefferson declared in the Kentucky Resolutions that "alien friends are under the jurisdiction and protection of the law of the State wherein they are: that no power over them has been delegated to the United States." Madison and Jefferson did not question that the federal government had jurisdiction to set rules for naturalization -- the provisions extending the length of time a person had to reside in the United States before becoming a citizen they did not like, but never challenged as unconstitutional. Other than the naturalization provision Madison and Jefferson rejected the idea that Congress could deport aliens for criticizing

US policy, or that the federal government possessed any jurisdiction for regulating the conduct of aliens once they took up legal residence in the United States.

The Virginia and Kentucky Resolutions are also of great significance in the current debate because they help to put into better context certain writings of Madison in the Federalist Papers which the Appeals Court has cited -- incorrectly -- in support of its ruling. The First Circuit decision cited Madison's words that "'[t]he powers delegated by the proposed Constitution to the federal government are few and defined' and 'will be exercised principally on external objects, as war, peace, negotiation and foreign commerce.'" It is almost inconceivable that anyone could take these words as supporting the court's opinion, but so the majority opinion suggests.

There can be little doubt, when Madison's writings elsewhere are taken into account -- especially the above cited Resolutions -- that what Madison means by "external objects" certainly do not extend to matters which occur inside the boundaries of the States.

Again citing a statement of Madison out of proper context the court takes as a major support for its position the phrase that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations" (Fed 42). Once again, however, it is quite clear that Madison is referring to external functions and policies, and certainly not to matters internal to the States.

Similar statements by Alexander Hamilton are also twisted by the First Circuit in an attempt to support its ruling. The First Circuit noted Hamilton's view that "the Articles of Confederation, by failing to contain any 'provision for the case of offences against the law of nations,' left 'it in the power of any indiscreet member to embroil the Confederacy with foreign nations.'"

Hamilton is discussing acts of piracy or terrorism which are protected by a country's refusal to prosecute them. Throughout history there have been cases such as that which started the First World War, when Serbia refused to prosecute a terrorist, and today with Libyan terrorists which the Libyan government protected. This sort of violation of the law of nations is so far removed from the sort of action being carried on by Massachusetts in the current case as to be almost laughable in comparison.

II. States may exercise any power which is not "absolutely and totally CONTRADICTORY and REPUGNANT" to powers exercised by Congress.

Any fair reading of the Constitution makes plain that the setting of a state's purchasing decisions is a power entirely reserved to the state. (Indeed, a strict reading of the Constitution -- and the explicit statement of Madison and Jefferson in the Resolutions -- demands that while the federal government may be able to declare an embargo on a foreign country, and it may attempt to stop the importation of such goods into the United States, nevertheless, once having arrived here the federal government possesses no police power to prosecute any person or entity for purchasing those goods on the domestic market.)[2]

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[2] "The Constitution of the US, having delegated to Congress power to punish treason, counterfeiting the securities and coin of the United States, piracies and felonies on the high seas, and offenses against the law of nations, and no other crimes whatsoever, all other acts which assume to create define or punish crimes, other than those So enumerated in the Constitution are altogether void, and of no force." Kentucky Resolution of 1799.

Hamilton in the *Federalist Papers* lays out quite clearly to what extent state sovereignty is reserved under the new Constitution:

> the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: [1] where the Constitution in express terms granted an exclusive authority to the Union; [2] where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and [3] where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally CONTRADICTORY and REPUGNANT [emphasis original].

Hamilton then immediately continues, and should be highlighted because it seems to describe precisely what is at issue in the current case:

> I use these terms [absolutely and totally CONTRADICTORY] to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the POLICY of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.

Hamilton's words here have immediate and obvious application to the current case. That a state policy may produce embarrassment to the US government or produce "occasional interferences in the POLICY" of the US government does not invalidate state sovereignty.

As if the authority of *The Federalist* is not sufficient we might also note that this specific tripartite scheme of determining whether or not a grant of power is exclusive to the federal government has also been affirmed by this Court, most notably in *Gibbons v. Ogden*.[3]

The First Circuit opinion relies upon the premise that the exercise of article 1 section 8 foreign powers by Congress is contradictory to any similar power in the states. Article 1 section 10, as authoritatively interpreted by *Gibbons*, indicates otherwise. As the Court noted in *Gibbons* "limitations of a power furnish a strong argument in favor of the existence of that power, and the section [I, 10] which prohibits the states from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden."[4]

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[3] "An affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant" (*Gibbons v. Ogden*, 9 Wheat. 1, 6).

[4] Hamilton makes a similar comment in Federalist 84 noting: "why declare that things shall not be done which there is no power to do . . . the Constitution ought not be charged with the absurdity of providing against an abuse for which no power is given." These comments were made in noting why a "Bill of Rights" was unnecessary, but show the attitude of Hamilton and the other Framers

Again, this Court said that the various prohibitions on state actions contained in article 1 section 10 are actions which are not prohibited by the positive enumeration of similar powers to Congress in Article 1 section 8, and could have been exercised by the states if not specifically prohibited by I, 10.

What are some of these restrictions found in I, 10: "No state shall enter into any Treaty, Alliance or Confederation; grant letters of Marque and Reprisal . . . lay any Imposts or Duties on Imports and Exports." *Gibbons* noted that "a state might impose duties on exports and imports, if not expressly forbidden [by 1, 10]."

If as this Court ruled in Ogden, neither the "foreign commerce power" nor the treaty making power of Congress prohibit a state from making treaties or imposing duties then all the more it must be true that the type of activity under dispute in the current case cannot possibly run afoul of the foreign commerce clause or the foreign policy powers of Congress.

This analysis of Art 1 section 10 makes clear the nature of what Hamilton and the other Framers believed was is "absolutely and totally CONTRADICTORY and REPUGNANT."

I, 8 gives Congress power "to grant letters of marque and reprisal, and makes rules concerning captures on land and water, and to levy imposts and duties. But these things were then later prohibited to the states by section 10, showing that the Framers did not think that the exercise of such powers by the states was "absolutely and totally CONTRADICTORY and REPUGNANT" to those powers granted to Congress.

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that explicit prohibitions were unnecessary – and even dangerous – unless targeted to otherwise existing powers.

The prohibition on states levying imposts or making treaties is not based on section I, 8 (as the First Circuit seems to suggest) but is based upon I, 10. Any challenge to the Massachusetts Burma law as unconstitutional will need to based upon an interpretation of I, 10 – and such an argument cannot be made.

III. State policy must DIRECTLY affect foreign countries to be regarded as engaging in foreign policy.

***1. Clark v. Allard* affirms indirect standard**

The case most similar to the present one, and the most important precedent for it is clearly *Clark v. Allard*. As now, a state statute which sought to "promote" or encourage certain policies in foreign countries was challenged. As the Court summarized it:

> The challenge to the statute is that it is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government. ... The argument is that by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an offer of reciprocal arrangements is said to be a matter for settlement by the Federal Government on a nation-wide basis.

The Court in *Clark*, however, not only rejected this argument, but even ridiculed it, ruling:

> In *Blythe v. Hinckley*, California had granted aliens an unqualified right to inherit property within its borders. ... The argument was that a grant of rights to aliens by a State was, in absence of a treaty, a forbidden entry into foreign affairs. The court rejected the argument as being an extraordinary one. The objection to the present statute is equally far fetched.

This Court concluded that "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

The ruling in *Clark*, therefore, is that even in cases where a local statute is designed to promote or change certain policies of other countries, such statutes are perfectly constitutional so long as the laws result in EITHER incidental OR indirect effect in foreign counties.

The First Circuit opinion while purporting to accept this standard states repeatedly that the action of Massachusetts is "more than incidental or indirect." This statement indicates that the First Circuit either does not know the meaning of the word "or" or else it does not know the meaning of the word "indirect." The word "or" is a conjunction denoting alternatives. The First Circuit appears to hold the Massachusetts law up to a standard that the effect must be BOTH incidental AND indirect. This is clear misreading of *Clark*.

Alternatively, the First Circuit must not understand the meaning of the word "indirect" for it is impossible for a cause to be "more than indirect." Logically a cause is either direct or indirect. It does not seem that anyone maintains that the Massachusetts policy has any DIRECT effect on conditions in Burma. It directly affects companies that wish to do business with the Commonwealth, and these companies may in turn may decide not to do business in Burma. Thus any effect

of the Massachusetts law on Burma can only be said to be "indirect."[5]

***2. ZSCHERNIG v. MILLER* (389 U.S. 429) upholds the "indirect" standard.**

The ruling in *Zschernig* upholds the standard that state laws are constitutional which have only an indirect effect in foreign nations. The ruling in *Zschernig* concluded specifically that "The present Oregon law . . . has a *direct* impact upon foreign relations." (Emphasis added) The penultimate sentence of the opinion thus declares unequivocally that the effect of the law in dispute there was "direct," thus running afoul of *Clark's* standard that laws which "indirectly" affect foreign policy are permissible.

A quick summary of the issues in *Zschernig* shows both the fundamental difference with Massachusetts' Burma Law, and also clarifies what sorts of things might qualify as engaging in "foreign policy." The Oregon law in *Zschernig* applied only to the transmittance of property to nonresident aliens, thus it only applied directly to persons outside of the country. The opinion in *Zschernig* suggested that the specific areas where the state of Oregon trespassed on powers ceded to the federal government was in "*the control of the international transmission of property, funds, and credits, and the capture of enemy property.*"

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[5] A cause is direct when it brings about an effect immediately, necessarily and without intermediary. While the Massachusetts policy is designed to affect the action of Burma it depends upon the action of intermediaries to accomplish that end. Philosophers also speak of direct and indirect causes as "proper or remote" and as "per se or accidental."

In stark contrast, the Massachusetts law does not affect "the international transmission of property, funds, and credits, [or] the capture of enemy property" rather it affects only businesses "within" Massachusetts. The California law challenged in *Zschernig* "directly" (and, in fact, exclusively) affected persons in other countries. The Massachusetts law is exactly the opposite, and hence is in full conformity with the ruling in *Zschernig*.

IV. This Court in the past has carefully protected the autonomy of local communities, to make decisions such as in the Massachusetts Burma Law.

Clark and *Zschernig* were both careful to protect traditional spheres of state and local autonomy. *Zschernig* noted that:

> State courts, of course, must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation - whether the matter involves commercial cases, tort cases, or some other type of controversy.

State actions and policies will inevitably effect foreign countries, but it is certainly true that "it has never been seriously suggested" by this Court that states must refrain from any policy or law which "may disturb a foreign nation."

Mere protest from some foreign country does not indicate in any way that a state has intruded into foreign affairs. It may rather indicate that a foreign country has intruded into our domestic affairs. For example, many

countries have protested the use of capital punishment in the United States. Sometimes, this may be with respect to a foreign national, or simply an objection to capital punishment in general. It has never been seriously suggested that if a state chooses to mete out capital punishment that it is engaging in foreign policy.

V. The First Circuit ruling threatens to undermine many areas of lawmaking which this Court has previously ruled as being the exclusive province of the States.

1. Alleged Unlimited Nature of Foreign Policy would dissolve the distinction between what is internal and what is external.

Capital punishment provides a good example for discussing the so-called "unlimited" nature of the US government's foreign policy. It is certainly the case that the use of capital punishment by the states (and the federal government) has caused friction with other nations. It might be that a foreign nation may refuse to extradite an accused criminal because of the possibility of a death sentence. It would seem to be an appropriate exercise of the treaty making power of the federal government to enter into an extradition treaty which guarantees that no person extradited to the United States will be executed. It would, however, go well beyond the treaty making powers of the federal government to enter into a treaty which simply prohibits capital punishment in every case. That would be an intrusion into an area of criminal punishment reserved to the states. The first case is a matter of international cooperation, the second would simply be an end run around the Constitution in the name of an international treaty. The president and the Senate,

of course, may not make a treaty pledging to do something which is prohibited by the Constitution -- such as nullifying the First, or even the Tenth, Amendment.

Various international treaties, if taken to supercede local laws, could all but eliminate local decision making in dozens of areas constitutionally reserved "to the States or to the people." Local control of education, law enforcement, criminal punishment, and welfare could all be undermined in the name of international law. It has been seriously argued that the International Covenant on Civil and Political Rights overrules state sodomy laws (which were, of course, explicitly upheld by this court in *Bowers* 478 US 186 (1986). [6]

Similarly it has been argued that the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, ruling by the International Court of Justice can overrule both state and federal laws. The potential disruption of local decision making is enormous if one were to accept that internal, domestic policies can be challenged based on such international treaties.

The First Circuit opinion declares that "when it comes to foreign affairs the powers of the federal government are not limited" and appeals to *US v. Curtiss-Wright Export* (299 US 304). However, this Court's opinion in Curtiss noted that "The whole aim of the [Congressional] resolution is to affect a situation

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[6] *See, e.g.*, Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: a Head-On Collision with* Bowers v. Hardwick, 58 ALB. L. REV. 725, 771-73 (1995).

entirely external to the United States, and falling within the category of foreign affairs" (emphasis added). The First Circuit casts such an expansive understanding of "foreign affairs" that it included not only those things "entirely external to the United States" but extends even to domestic affairs which are entirely internal to a specific state.[7]

The majority opinion in *Curtiss* then, proclaimed that "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations

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[7] Although the current case does not contradict *US v. Curtiss*, it should be noted that the reasoning in *Curtiss*, namely, that the US government did not receive its foreign affairs powers from the Constitution, and therefore is not limited to any cession of power received from the states, is based on a demonstrably false historical premise. *Curtiss* asserted that:

> By the Declaration of Independence, 'the Representatives of the United States of America' declared the United (not the several) Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.' As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.

The wording of the Declaration is undoubtedly plural: "these United Colonies [plural] are and of right ought to be free and independent states [plural]; that they [plural] are absolved from all allegiance . . . they [plural] have full power to levy war, conclude peace" and so forth. Moreover it is an historical fact that each of the colonies separately issued their own proclamations of independence, and moreover, that under the Treaty of Paris, the British crown granted independence to each of the colonies individually and recognized "them" to be "free, sovereign and independent states."

with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." It seems a dangerous precedent to proclaim that the federal government may possess various unenumerated powers which are "necessary concomitants of nationality." The First Circuit suggests that power to nullify local purchasing decisions may be one of them. This Court in *Curtiss*, of course, limited those things "concomitant with nationality" to several specific and enumerated powers. The attempt of the First Circuit is to create further "hidden powers" which effect the internal affairs of states.

While the decision in *Curtiss* does not run afoul of the Massachusetts law under dispute here, the doctrine posited therein is an ill thought out one, based upon a flawed historical understanding and an openly extra-textual interpretation of the Constitution unsupported by any writings of the framers. This Court may well take the opportunity to repudiate *Curtiss*.

Despite serious problems with *Curtiss*, it does contain the truth that the powers of the federal government differ greatly between internal and external affairs (as for example between banning executions for those extradited, versus banning execution generally). Obviously, protections for US citizens to life, liberty and property do not apply to enemy combatants in a war zone. The First Circuit, however, tries to negate the difference between what is internal and what is external, by appealing to a more expansive vision of "foreign affairs" which includes much that is internal, if not everything which in some way "affects foreign affairs."

2. Expansive Reading of Foreign Commerce Clause runs afoul of this court's recent narrow reading of interstate commerce clause.

The First Circuit has, in effect, set up an expansive standard that anything which "affects" foreign policy is an area of legislation prohibited to the states. This seems little more than an attempt to apply the same expansive reading of the "interstate commerce clause" which this court has recently rejected and which is being considered this term in *Brzonkala v. Virg. Tech.* This Court in *Lopez* (514 US 549) declared that activities which are purely internal to a state cannot be regulated by the federal government under the guise of regulating commerce among the states or with foreign nations. Quoting *Gibbons* the *Lopez* court reaffirmed that "It is not intended to say that these words [of the commerce clause] comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State."

The Massachusetts Burma Law clearly falls into the class of activities which are "completely internal." As *Lopez* declared, allowing the federal government to regulate actions which are completely internal in the name of regulating commerce among the states or with foreign nations "would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States."

And quoting *NLRB v. Jones & Laughlin Steel (301 US 893)*, this Court in *Lopez* noted that the scope of the interstate commerce power

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

The same can certainly be said of the foreign commerce power as the interstate commerce power. To expand congressional power under this grant to include things which are either "indirectly" or "remotely" related to foreign commerce would effectively "obliterate the distinction between what is national and what is local."

3. The "speak with one voice" theory was never more than a metaphor, which, taken literally, could undermine important local expression.

The First Circuit's ruling with respect to the need of the federal government to "speak with one voice" is a preposterous extension of federal power which threatens to undermine scores of local actions.

The so-called "one voice" theory originated with *Michelin Tire v. Wages* (which is not even cited by the First Circuit opinion). In *Michelin (423 US 276)*, the phrase is used only once, and is clearly being used metaphorically:

> The Framers . . . committ[ed] sole power to lay imposts and duties on imports in the Federal

> Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power.[8]

Michelin, as with *Japan Line* (441 US 434) and *Container Corp (463 US 159)*, involved taxes which may have been, in effect, imposts. The phrase in *Michelin* was simply meant to say that imposts must be uniform throughout the United States. In *Japan Line*, decided the same year, the court made a bit greater use of the "speak with one voice" metaphor, but again the use was clearly metaphorical and not intended to be taken in any literal sense. Then, this Court in *Container Corp*. defined a bit more precisely what was meant by the "one voice" standard:

"The California tax does not violate the 'one voice' standard established in *Japan Line*, supra, under which a state tax at variance with federal policy will be struck down if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive."

Thus the Court made clear that, whatever, the "one voice" standard may mean, it does not prohibit all local actions which effect foreign policy or even which are at variance with federal policy, but only those "foreign policy issues which must be left to the federal

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[8] As noted above, the "sole power" to levy imposts stems from Art 1, sec 10, prohibiting such action to the States.

government" or those which violate a clear federal directive which has been constitutionally enacted.[9]

The First Circuit in making its "one voice" argument has expanded a metaphorical phrase into a full blown policy. The decision appeals to the "one voice" argument no less than 20 times -- rather astounding considering that *Michelin Tire* and *Container Corp* each use the phrase only once, and attach no particular importance to it. Moreover, the First Circuit seems to want to use the "speak with one voice" standard in a quite literal sense, meaning that state and local governments are prohibited from making any sort of protest over things related to foreign affairs.

The First Circuit opinion even calls into doubt the ability of state and local governments to adopt resolutions condemning the actions of foreign states. The opinion says in footnote 18 that "We do not consider here whether Massachusetts would be authorized to pass a resolution condemning Burma's human right record but taking no other action with regard to Burma." The clear implication of the opinion, however, is that even such resolutions run afoul of a literal "one voice" standard.

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[9] Some might try to argue that in the phrase "foreign policy issues which must be left to the United States," that "which must be left to the United States" should be taken as an apposition, that is "foreign policy issues, [comma] which must be left to the United States." That reading, however, is clearly precluded by the lack of a comma following "foreign policy." Grammatically then, "which must be left to the United States" must be taken as a limiting modifier of "foreign policy issues" and not as an apposition. The same conclusion follows from the use of the word "issues." While "foreign policy" per se must be left to the federal government, "foreign policy issues" is a wider, more amorphous, term encompassing "issues" which affect foreign policy but are not, properly speaking, foreign policy.

State and local governments have long been in the practice of passing resolutions with regard to issues of international importance, or with respect to treaties or international agreements being considered by the Congress. For example, a number of local governments last year passed resolutions opposing the Multilateral Agreement on Investment.

Local communities must remain free to comment on issues of international importance, especially issues which can affect local communities very directly. Local communities must be free not only to protest conditions, but to refuse to cooperate in activities which the community regards as immoral. As this Court noted in *Printz*, "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." It is entirely proper, if not obligatory, that a State's policies, including purchasing decisions, should represent the values of its citizens. For example, a local government might adopt a policy that it would not do business with companies which use slave labor, or sweatshop conditions. This is a perfectly valid reflection of community standards, even though it might indirectly discriminate against foreign companies, since such working conditions are illegal in the United States.

This Court has correctly noted elsewhere that decisions about how to spend one's money is a form of speech. We often ask people to "Put their money where their mouth is" to show that their criticism is meant. It is hypocritical, at the least, to do business with a corporation which a community believes to be engaging in immoral practices.

Governors routinely negotiate with foreign leaders and foreign businesses about investing in their state. While they cannot sign treaties (at least, not

without Congressional sanction) semi-official negotiation might well be considered "meddling in foreign affairs reserved to Congress" or violating the "one voice" policy.

The actions or protests of local governments may embarrass the federal government. Protests may even oppose official US policy. For example, during the 1980's local governments formed sister-city relationships with Nicaraguan cities in protest of American involvement there. As *Container Corp* noted however, an action of a local government opposing US policy is not ipso facto unconstitutional, but only if it tramples on specific powers ceded to the federal government.

The "one voice" argument is dangerously close to the repudiated Alien and Sedition Acts which proclaimed that once the federal government made a decision about foreign policy that no one was free to criticize it. In a free society, we allow and encourage diverse voices on matters of public policy, we do not try to stifle them. And in our federal system, we encourage laws which represent diverse values, and experiment with diverse ways of addressing problems.

It should also be noted in passing that the "one voice" theory is internally inconsistent, since both Congress and the President (and now potentially the courts) all play a role in formulating federal foreign policy. *Curtiss* seems to suggest that the "one voice" belongs to the president, while *Michelin* suggests that voice belongs to Congress. The idea that the "federal government must speak with one voice on matters of foreign policy" is therefore impossible to realize, given our system of divided government and "check and balances."

CONCLUSION

In recent decisions such as *Lopez*, *New York v. US*, *Printz*, *City of Boerne*, *Alden*, *College Savings Bank* and others, this Court has embarked upon a path of upholding the independence of state and local government. All of these cases involved "a considerable congressional intrusion into States' traditional prerogatives" (*City of Boerne v Flores*). The current case is of a slightly different nature, but in the same line. This time it is not Congress which is attempting to intrude into State's traditional prerogatives, but the courts.

In some ways, however, interference by the courts is even worse. As this Court recently noted in *Alden*, "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen" (*Alden v. Maine*).

It would be inconceivable, that at a time when this Court has fought so strongly against Congressional intrusions into local decision making, that it would allow a thousand unelected judges to exercise similar power.

Respectfully submitted,

Kenneth B. Clark, *Counsel of Record*

Coalition for Local Sovereignty

611 Pennsylvania Ave, SE # 169

Washington, DC 20003

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IN THE SUPREME COURT OF THE UNITED STATES

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NEW YORK CITY COMPTROLLER, LOS ANGELES, CALIFORNIA, PHILADELPHIA, PENNSYLVANIA, SAN FRANCISCO, CALIFORNIA, BOULDER, COLORADO, PORTLAND, OREGON, QUINCY, MASSACHUSETTS, OAKLAND, CALIFORNIA, BROOKLINE, MASSACHUSETTS, CARRBORO, NORTH CAROLINA, BERKELEY, CALIFORNIA, NEWTON, MASSACHUSETTS, NORTH OLMSTEAD, OHIO, SANTA CRUZ, CALIFORNIA, AMHERST, MASSACHUSETTS AND THE COUNTY OF ALAMEDA, CALIFORNIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Sara C. Kay
Jane R. Levine*
OFFICE OF ALAN G. HEVESI
COMPTROLLER OF THE CITY OF NEW YORK
One Centre Street
New York, New York 10007
(212) 669-3749
**Counsel of Record*

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INTEREST OF AMICI CURIAE[1]

In *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) the First Circuit Court of Appeals invalidated a Massachusetts selective purchasing law designed to discourage state agencies from using public money to purchase goods and services from suppliers that do business with Burma (now known as Myanmar). This "Burma Law" requires state agencies to deem that bids from such putative contractors are ten percent higher than the price actually offered. *See* Petitioner's Brief, pp. 5-10. By providing a ten percent competitive advantage to contractors that do not do business with Burma, the citizens of Massachusetts, through their elected officials, seek to avoid using their tax levy revenues to support the profoundly antidemocratic government of Burma in its well-documented campaign of human rights abuses. The First Circuit ruled, *inter alia*, that the Commonwealth of Massachusetts lacked a "legitimate local purpose [for this law] that cannot be adequately served by reasonable nondiscriminatory alternatives" and held that the law unconstitutionally encroaches on federal authority over foreign affairs and interferes with foreign commerce.

The *amici curiae* are cities, towns, counties and elected officials[2] of cities having selective purchasing laws limiting

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[1] Pursuant to Rule 37.6 of this Court, the *amici* represent that counsel for the *amici* authored this brief in its entirety and that no person or entity other than the *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

[2] The Comptroller of the City of New York is an independently elected official who, under the City Charter, has oversight authority over City contracting procedures, including compliance with selective purchasing laws, and who is a trustee of, and the investment advisor to, the City's pension funds.

their purchases of goods and services from suppliers that do business with Burma and/or other countries. Each *amicus'* selective purchasing law is one of a series of spending guidelines intended to ensure that its procurement and investment programs reflect its citizens' priorities -- which include an unwillingness to do business directly or indirectly with entities that violate basic human rights norms. The local government *amici* have a significant stake in the continued viability of selective purchasing laws and are concerned about maintaining the proper federal-state balance in this respect.

The First Circuit's Decision Threatens Government Procurement and Investment Laws in States and Localities Nationally.

Community-based selective purchasing laws have a distinguished lineage. The best-known examples undoubtedly are the state and local anti-Apartheid laws passed in the late 1970's and 1980's.[3] *See, e.g., Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 562 A.2d 720 (1989), *cert. denied*, 493 U.S. 1093 (1990). These procurement and divestment initiatives, supported by a strong national grass-roots movement, led to the passage of the federal Comprehensive Anti-Apartheid Act of 1986 over then-President Reagan's veto, and were a major factor in encouraging the South African government to institute broad human rights reforms. *See* Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 Foreign Policy 158, 160 (1992).

[3] According to one commentator, 23 states, 14 counties, 80 cities and the Virgin Islands enacted divestment or procurement laws directed to South Africa's apartheid policies. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l Law 821, 822 (1989).

Since then, state and local governments across the country have responded to citizen demands by enacting a variety of laws establishing other non-economic standards for their procurement and/or investment programs. For example, like Massachusetts, a number of communities have enacted selective purchasing laws that restrict public contracts with vendors doing business with foreign sovereigns having poor human rights records. *See, e.g.*, LOS ANGELES, CA., ADMIN. CODE, §§ 10.38 et seq; SAN FRANCISCO, CA., ADMIN. CODE, Ch.12J; PHILADELPHIA, PA., CODE § 17-104(b); ALAMEDA COUNTY, CA., ADMIN. CODE, Ch. 4.32, Ch. 4.36; OAKLAND, CA., MUNI. CODE, Ch. 2.04, Arts. II, III; NEWTON, MASS., ORDINANCES V-146; BOULDER, CO., CODE Sec. 2-8-11, B.R.C. 1981. Many states and localities limit public contracts with vendors that fail to comport with other ethical standards of concern to their citizens. *See, e.g.*, BROOKLINE, MASS., RESOLUTION (July 12, 1976) (government contractors may not participate in Arab League boycott of Israel); NEW YORK, N.Y., ADMIN. CODE § 6-115.1 (establishes preferences for contractors that agree to provide equal employment opportunity to workers of all religions if they operate in Northern Ireland).

Many communities also have guidelines focussing on environmental and labor standards. For instance, three states and numerous municipalities have enacted laws limiting the purchase of wood from tropical rainforests, buying only tropical timber that is certified as having been harvested using ecologically-sound management practices. *See, e.g.*, ARIZ. REV. STAT. ANN. § 34-201 (West 1998); N.Y. STATE FIN. L. § 165 (McKinney 1998); TENN. CODE ANN. § 4-3-112 (1998); BALTIMORE, MD., ORDINANCES No. 635 (1991); SAN FRANCISCO, CA., ORDINANCES No. 391-90; SANTA MONICA, CA., MUNI. CODE. ch. 2.28. Other communities have established purchasing preferences for goods having recycled content. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE § 6-322. In addition, several municipalities and counties have adopted

government procurement standards barring products made in sweatshops. *See, e.g.*, NORTH OLMSTEAD, OHIO, RESOLUTION No. 97-9 (1998).

A number of municipalities and states also have chosen to use their purchasing power to support local businesses by enacting "Buy-American" laws for public procurements. *See, e.g., Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 112 (1991) (upholding Pennsylvania Steel Products Procurement Act).

In addition to selective purchasing laws, many state and local governments have adopted ethical rules concerning the investment of public funds. *See, e.g.*, SANTA CRUZ, CA., CITY COUNCIL POLICIES No. 29.13 (companies doing business with Burma); TAKOMA PARK, MD. ORDINANCES No. 1985-4, § 1 (companies that produce nuclear weapons); 1999 VERMONT LAWS, ch. 13 (state pension funds required to support shareholder resolutions concerning Burma). Most recently, a number of municipalities and states successfully used the threat of an investment and purchasing boycott against certain banks and insurers to encourage these companies to settle outstanding Holocaust-era claims. *See* Joan Warner with John Parry, *Swiss Banks: the Noose Tightens*, Business Week, July 27, 1998 at 66.

The continued viability of these laws is important because they represent community-based democracy at its best. They raise public consciousness on important issues of public policy and stimulate debate concerning the best use of community resources. If the First Circuit's decision is upheld, legitimate spending programs of state and local governments nationwide will be severely disrupted. As importantly, states and localities will lose an important tool for fostering civic engagement and clarifying common values on important and community-defining questions. The *amici's*

interest in this case is best reflected in Justice Breyer's observation that "[f]ederalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2239 (1999) (Breyer, J., dissenting).

SOURCE OF AUTHORITY TO FILE

The *amici* have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Pursuant to Rule 37.2(a) of the Rules of this Court, *amici* obtained letters from each of the parties granting permission to file this brief, which accompany their submission.

SUMMARY OF ARGUMENT

The question presented by this case is whether the federal courts can declare that state spending guidelines unconstitutionally interfere with federal authority over foreign commerce and foreign affairs, where Congress has implicitly permitted the state action. The answer clearly must be in the negative.

As residual sovereigns, states have strong Tenth Amendment interests in controlling their own spending. They have a direct responsibility to their citizens to expend public resources in a manner comporting with community ethics and priorities. Where the Federal government exercises authority over such core state functions, states lose their autonomy; accountability and authority are blurred and principles of participatory democracy are threatened.

In view of the important Tenth Amendment concerns at issue, the court below never should have reached the question of whether the state law violated the foreign commerce

clause or the foreign affairs power. That decision belongs to Congress, both as a matter of constitutional structure and a matter of institutional expertise. Indeed, mindful of the complex political considerations underlying state proprietary action, this Court has disclaimed competence to apply commerce clause analysis to state spending. Moreover, in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), this Court recently declared itself to be the "wrong forum" for determining whether state laws unconstitutionally interfere with the foreign policy needs of the nation. In finding the Massachusetts Burma law unconstitutional, the First Circuit misperceived the important state interests at stake and failed to heed this Court's warnings about deciding questions better left to the political branches.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS HAVE STRONG SOVEREIGN INTERESTS, GUARANTEED BY THE TENTH AMENDMENT, IN MAKING SPENDING DECISIONS THAT COMPORT WITH BOTH THE ECONOMIC AND ETHICAL PRIORITIES OF THEIR CITIZENS.

The First Circuit's mistaken decision to declare the Massachusetts Burma Law unconstitutional ultimately rested on its failure to take into account the important Tenth Amendment concerns raised by selective purchasing laws. The court framed its brief consideration of the state's interest in this case by asking whether "moral concerns regarding human rights conditions abroad" amount to a "legitimate local purpose" justifying the enactment of the Massachusetts

statute.[4] *National Foreign Trade Council*, 181 F.3d at 70-71. But Massachusetts' interest in this law goes beyond whether a state may express its views on human rights matters.[5] Here, the state has an independent institutional interest, apart from the substance of its social goals, in spending public money in a way that reflects the views of its citizens.

As a matter of constitutional design, the federal government was granted only specifically enumerated and discrete powers, with all remaining authority residing in the states as "residuary and inviolable sovereign[s]". *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)). In establishing a bifurcated system, the founders created "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.* at 920 (quoting *U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779 (1995) (Kennedy, J., concurring)). This division of power and authority, while implicit in the limited constitutional grants to the federal government, was made express in the Tenth Amendment. *Id.* at 919.

---

[4] The *amici* disagree with the application of this test, which incorrectly assumes that the Massachusetts law facially discriminates against international commerce. *See* Petitioner's Brief, pp. 46-47. However, the lower court's analysis is useful insofar as it illustrates its fundamental misunderstanding of the nature, purpose and function of selective purchasing laws.

[5] Indeed, there are strong arguments, which *amici* do not address here, that to the extent selective purchasing laws are pure expressions of public morality, they enjoy First Amendment protection from interference by the federal government. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1 (Feb. 1999).

Among the sovereign prerogatives reserved to the states and to the municipalities within their borders[6] is control over their own proprietary activities, including spending. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436-440 (1980). In this respect, constitutional form follows function. Without control over their own budget and business affairs, states and localities would lack autonomy and financial independence, and ultimately would lose control over "the course of their public policy and the administration of their public affairs." *See Alden v. Maine*, 119 S.Ct. 2240, 2264-65 (1999) (quoting *In re Ayers*, 123 U.S. 443. 505 (1887)).

Moreover, as "guardian and trustee for its people," each state and local government is directly responsible to its citizens to administer public assets in conformity with their needs and priorities. *Reeves*, 447 U.S. at 438. "Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Alden*, 119 S.Ct. at 2245. Nothing is more central to the way in which a government entity functions or is more telling about its priorities and basic political philosophy than the way it spends its money. If state or local officials use the public treasury in a manner failing to reflect the priorities and interests of their electorate, they are easily held accountable on voting day. The expenditure of tax levy funds is a matter of significant community interest and goes to the heart of democratic control of local institutions. *Cf. Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (political accountability for spending is strongest on the state level).

[6] Both state and municipal governments are protected from federal encroachment by the "Constitution's guarantees of federalism, including the Tenth Amendment." *Printz*, 521 U.S. at 932, n.15.

Local sovereignty over spending is not limited to crafting a budget, or establishing programs, but also extends to policy decisions about the identity of the contractors with whom the government wishes to deal. *See Reeves*, 447 U.S. at 438. Community ethics play an important and appropriate role in making these assessments.[7] *See Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1981) (state may consider "moral integrity" of a contractor in deciding whether to award a public contract). There is nothing in the law prohibiting communities from applying non-price criteria -- such as human rights and environmental standards -- in selecting public contractors or investments. Putting it differently, the constitution does not *require* citizens, through their state and local governments, to conduct business directly or indirectly with slave-owners, dictators, or polluters.[8]

Through selective purchasing laws like the Massachusetts Burma Law, taxpayers collectively express their values and preferences in matters of public procurement, much as individual citizens do when refusing to invest in or purchase consumer goods from companies whose business,

[7] Many state and local procurement laws require a determination that a contractor is "responsible" before it can be eligible for government contracts. *See, e.g.*, N.Y. GEN. MUN. L. § 103 (McKinney 1998). The responsibility determination can, and often does, incorporate general public interest values. *See, e.g. Tully Construction Co., Inc. v. Hevesi*, 625 N.Y.S.2d 531, *appeal dismissed, leave to appeal granted*, 86 N.Y.2d 807 (1995), *appeal withdrawn*, 87 N.Y.2d 969 (1996) (contractor that, among other things, has ties to organized crime and previously violated environmental laws of another state, may not receive municipal contract).

[8] As discussed in the *amicus* brief of the AFL-CIO in the court below, it is not possible to do business in Burma without subsidizing and benefiting from forced labor, including child labor. *See* Brief *Amicus Curiae* of the American Federation of Labor and Congress of Industrial Organizations, pp. 18-20.

employment, or other practices they do not wish to condone.[9] The diversity of approaches reflected in these laws does not neutralize the protections afforded by the Tenth Amendment: "The genius of our government provides that, within the sphere of constitutional action, the people -- acting not through the courts but through their elected legislative representatives -- have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering v. Gephardt*, 304 U.S. 405, 428 (1938) (Black, J., concurring).

The lower court's sweeping conclusion that Massachusetts' interest in its Burma Law could have been "adequately served by reasonable nondiscriminatory alternatives" betrays a fundamental misunderstanding of the nature and purpose of these laws. *National Foreign Trade Council*, 181 F.3d at 70. Selective purchasing legislation does not merely express generalized disapproval of Burma or other countries; it prevents local tax revenues from being used to subsidize and implicitly endorse practices that violate community standards and beliefs. Public procurement is not optional. States and localities must obtain goods and services in order to function, and must make judgments about where and from whom to buy them. Nothing short of selective purchasing and investment laws can adequately protect the community interests at stake.

[9] The lower court held that selective purchasing laws are not consistent with the behavior of "ordinary market participants" and therefore do not fall within the Commerce Clause market participation exception. *National Foreign Trade Council*, 181 F.3d at 65. However, non-government purchasers and investors often incorporate environmental, human rights, labor, health and other ethical standards into their decisionmaking. *See generally, e.g.*, Corporate Social Issues Reporter, Investor Responsibility Research Center (December 1999). Moreover, this Court repeatedly has found states to be "market participants" even where they are promoting interests unique to their citizens that are unlikely to be shared by other ordinary actors in the market. *See College Savings Bank*, 119 S.Ct. at 2230.

II. WHERE CONGRESS HAS REFUSED TO PREEMPT STATE AND LOCAL SELECTIVE PURCHASING LAWS, REVIEW UNDER THE JUDICIALLY CREATED DORMANT FOREIGN COMMERCE CLAUSE AND DORMANT FOREIGN AFFAIRS DOCTRINES IS INAPPROPRIATE.

In view of the significant Tenth Amendment interests at issue, the lower court should not have reached the question whether the Massachusetts Burma Law violated the foreign commerce clause or the foreign affairs doctrine. The *amici* agree with the Commonwealth of Massachusetts that Congress did not preempt the Burma Law, which predated the federal legislation concerning Burma and is consistent with the federal approach. *See* Petitioner's Brief, pp. 14-24. In overruling Congress' refusal to assert federal authority over the state's sovereign interests in its procurement program, the court exceeded both its constitutional role and its institutional capacity.

The structure of the constitution is the primary device for maintaining the proper balance between the supremacy of federal law and the independent interests of the states. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court observed that the principal safeguard for state sovereignty is the federal political process, which accommodates state interests because of the role the states play in choosing members of Congress and the Executive.[10] *Id.* at 550-51. By declaring the Burma Law

[10] This Court also teaches that the "good faith of the States" provides a corresponding guarantee concerning the supremacy of federal law. *Alden*, 119 S.Ct. at 2266. *See also Printz*, 521 U.S. at 930-931 (citing "duty owed to the National government, on the part of all state officials, to enact, enforce, and interpret state law in such a fashion as to not obstruct the operation of federal law.").

unconstitutional after Congress signaled its judgment that the state law did not interfere with foreign commerce or present a threat to the nation's foreign policy, the First Circuit usurped Congress' role as the constitutional arbiter in this respect. *Cf. U.S. v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J. and O'Connor, J., concurring) (Congress and the Executives' "sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.").

The lower court's decision is particularly problematic because this Court has disavowed institutional competence to assess the validity of state proprietary decisions under the Commerce Clause.[11] "[T]he competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, . . . as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court." *Reeves*, 447 U.S. at 439.

Moreover, in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), this Court recently declared the judiciary to be precisely the "wrong forum", *id.* at 328, for evaluating the kind of extraordinarily sensitive national interests and foreign policy considerations presented here. *See, e.g., National Foreign Trade Council*, 181 F.3d at 52 (concluding that the Burma Law has "more than an 'incidental or indirect effect in foreign countries'"), at 54 (weighing the law's "potential for disruption or embarrassment" to the nation based on complaints by ASEAN and the European Union), and at 68 (finding the law

[11] Although this case deals with the Foreign Commerce Clause, the political considerations involving foreign commerce counsel even greater restraint. *See Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. at 327-328.

interferes with the ability of the federal government to speak with "one voice").

In *Barclays*, 512 U.S. 298, the Court upheld California's method of taxing multinational corporations despite claims -- similar to those in this case -- that the tax interfered with the nation's ability to "speak with one voice" in matters of foreign policy and commerce and thus unconstitutionally impinged on federal prerogatives. The Court noted that Congress, the branch responsible for foreign commerce, had never enacted legislation explicitly prohibiting the California system, and therefore had "passively indicate[d] that certain practices do not impair federal uniformity in an area where federal uniformity is essential." *Id.* at 328. Emphasizing its inability to second-guess Congress' judgments, the Court explained that "[t]he judiciary is not vested with the power to decide "how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'" *Id.* at 328.

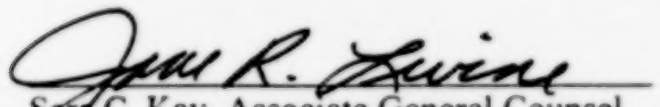
This case deals with the intersection of two highly politicized areas: state spending and foreign commerce. The federalism interests at stake in each dictate caution; together they mandate judicial deference to Congress' assessment of the constitutionality of the state law. "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden*, 119 S.Ct. at 2265. Were the lower court's decision allowed to stand, it would diminish the constitutional roles and interests of both Congress and the states, with a commensurate loss of liberty to the citizens of both.

CONCLUSION

For the reasons stated above, the *amici* respectfully request this Court to reverse the decision of the United States Court of Appeals for the First Circuit.

Dated: New York, New York
January 13, 2000

Respectfully submitted,



Sara C. Kay, Associate General Counsel
Jane R. Levine, Third Deputy
Comptroller*
OFFICE OF ALAN G. HEVESI,
COMPTROLLER OF THE CITY
OF NEW YORK
One Centre Street
New York, New York 10007
(212) 669-3749
Attorneys for *Amici Curiae*

**Counsel of Record*

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In The

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ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* STATES OF ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, TEXAS, UTAH, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONER

HEIDI HEITKAMP
Attorney General of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record

600 East Boulevard Avenue
Bismarck, North Dakota
58505-0040
(701) 328-2210
Counsel for Amici States

[State Attorneys General Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33pp

MARK PRYOR
Attorney General
of Arkansas
200 Tower Building
323 Center Street
Little Rock AR 72201-2610

BILL LOCKYER
Attorney General of
California
1300 I Street
Sacramento CA 95814

KEN SALAZAR
Attorney General of
Colorado
1525 Sherman St. 7th Fl
Denver CO 80203

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
Hartford CT 06106-1774

EARL I. ANZAI
Attorney General of
Hawaii
425 Queen Street
Honolulu HI 96813

RICHARD P. IEYOUB
Attorney General of
Louisiana
Dept Of Justice
PO Box 94005
Baton Rouge LA 70804-9095

ANDREW KETTERER
Attorney General of
Maine
6 State House Station
Augusta ME 04333-0006

J. JOSEPH CURRAN, JR.
Attorney General of
Maryland
200 St. Paul Place
Baltimore MD 21202

MIKE HATCH
Attorney General of
Minnesota
445 Minnesota Street
St. Paul MN 55101-2128

JEREMIAH W. (JAY) NIXON
Attorney General of
Missouri
207 West High Street
Jefferson City MO 65101

PHILIP T. MCLAUGHLIN
Attorney General of
New Hampshire
33 Capitol Street
Concord NH 03301

JOHN J. FARMER, JR.
Attorney General of
New Jersey
Richard J. Hughes Justice
Complex
PO Box 117
Trenton NJ 08625-0117

PATRICIA A. MADRID
Attorney General of
New Mexico
PO Drawer 1508
Santa Fe NM 87504-1508

HEIDI HEITKAMP
Attorney General of
North Dakota
600 E Boulevard Ave
Bismarck ND 58505-0040

W. A. DREW EDMONDSON
Attorney General of
Oklahoma
2300 N Lincoln Boulevard
Oklahoma City OK
73105-4894

HARDY MYERS
Attorney General of
Oregon
1162 Court Street NE
Salem OR 97310-0506

D. MICHAEL FISHER
Attorney General of
Pennsylvania
16th Fl, Strawberry Square
Harrisburg PA 17120

SHELDON WHITEHOUSE
Attorney General of
Rhode Island
150 South Main Street
Providence RI 02903

JOHN CORNYN
Attorney General of
Texas
PO Box 12548
Austin TX 78711-2548

JAN GRAHAM
Attorney General of
Utah
236 State Capitol
Salt Lake City UT 84114

WILLIAM H. SORRELL
Attorney General of
Vermont
109 State Street
Montpelier VT 05609-1001

CHRISTINE O. GREGOIRE
Attorney General of
Washington
PO Box 40100
Olympia WA 98504-0100

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INTEREST OF *AMICI*

The 22 *Amici* States submit this brief in support of Massachusetts. The States have a strong interest in state sovereignty and in protecting the right of States to pass laws governing state procurement and investment of state funds. Through these laws, elected State Legislatures legitimately exercise the citizens' sovereign right to decide how to spend and invest public money. Further, the *Amici* States have an interest in the Supreme Court's establishing a clear test that will limit the challenges to actions the States take in their proprietary roles.

New Jersey, New York, and Massachusetts have statutes that restrict the State's purchasing goods from specific countries or from companies that do business in those countries.[1] Currently, at least fourteen States have statutes that govern the State's investment of state funds in certain other countries or in businesses that do business with those countries.[2] The countries in which

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[1] New Jersey and New York restrict state purchasing from Northern Ireland. N.J. Stat. Ann. § 52:34-12.2 (West Supp. 1999); N.Y. State Fin. Law § 165(5) (McKinney 1997). Massachusetts, in addition to its Burma Law, also restricts state purchasing from companies that have links with Northern Ireland. Mass. Gen. Laws Ann. ch. 7, §§ 22C, 22D (West 1996). Maryland and Rhode Island have repealed statutes limiting state purchases of goods produced in South Africa. *See* Md. Code Ann., State Fin. & Proc. §§ 14-501 to 507 (repealed 1994); R.I. Gen. Laws § 37-2-57 (repealed 1999).

[2] States having restrictions on investment of state funds in companies doing business with Northern Ireland include: Connecticut, Florida, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Vermont. *See* Conn.

investments are limited or restricted include Cuba, Northern Ireland, and South Africa. Since the end of apartheid, many States have repealed their laws restricting investments in South Africa.[3] In addition to these

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Gen. Stat. Ann. § 3-13h (West 1999); Fla. Stat. Ann. § 121.153 (West 1999); Mass. Gen. Laws Ann. ch. 32, § 23 (West Supp. 1999); Mich. Comp. Laws Ann. § 38.1133a (West 1997); Minn. Stat. Ann. § 11A.241 (West 1997); Neb. Rev. Stat. §§ 72-1246.06 to .08 (1996); N.H. Rev. Stat. Ann. §§ 6:32 to :34 (Supp. 1999); N.J. Stat. Ann. §§ 52:18A-89.4 to 89.6 (West Supp. 1999); N.Y. Retire. & Soc. Sec. Law § 423-a (McKinney 1999); 24 Pa. Cons. Stat. Ann. § 8527 (West 1992), 71 Pa. Cons. Stat. Ann. § 5940 (West Supp. 1999), and 72 Pa. Cons. Stat. Ann. § 3773.1 (West 1995); R.I. Gen. Laws § 35-10-14 (1997); Tex. Gov't Code Ann. § 404.024(h) (West 2000); 1989 Vt. Acts & Resolves 50. Florida restricts investments of state funds in companies doing business with Cuba. Fla. Stat. Ann. § 215.471 (West 1999). The following States restrict the investment of state funds in South Africa: Massachusetts, Oregon, and Rhode Island. *See* Mass. Gen. Laws Ann. ch. 32, § 23 (West Supp. 1999); Oregon Anti-Apartheid Act of 1987, Or. Rev. Stat. §§ 293.830 to 293.870 (1997); R.I. Gen. Laws § 35-10-12 (1997).

[3] Arkansas, California, Connecticut, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Missouri, New Jersey, North Carolina, Oklahoma, and Texas all have repealed statutes restricting investment of state funds in South Africa. *See* Ark. Code Ann. § 24-3-416 (repealed 1994); Cal. Gov't Code § 16641.5 (repealed 1994); Conn. Gen. Stat. Ann. § 3-13f (repealed 1993); 40 Ill. Comp. Stat. Ann. 5/1-110(4)(b)(4) (repealed 1994); Iowa Code Ann. ch. 12A (repealed 1994); La. Rev. Stat. Ann. § 49:308.2 (repealed 1994); Me. Rev. Stat. Ann. tit. 5, §§ 1951-1954 (repealed 1993); Md. Code Ann., State Fin. & Proc. § 6-208 (repealed 1994); Mich. Comp. Laws Ann. § 37.2402(f) (repealed 1993); Mo. Ann. Stat. § 105.686 (repealed 1994); N.J. Stat. Ann. §§ 52:18A-89.1 to 89.3 (repealed 1994); N.C. Gen. Stat. § 147-69.2(c) (repealed 1995); Okla. Stat. tit. 62 §§ 71(E), 89.2(E) (repealed 1994); Tex. Nat. Res. Code Ann. § 161.173(b), (c)(2), (c)(5) (repealed 1995); and Tex. Const. art. XVI, § 70(r) (repealed by election held Nov. 2, 1999).

types of statutes, many States have "Buy American" laws.[4]

Although the instant case involves a state selective purchasing law, the market participant exception to the dormant Commerce Clause – both interstate and foreign – would apply equally to state laws limiting investment of state funds. Any expansion by this Court of the federal government's dormant foreign affairs power to strike down state laws governing state proprietary actions would threaten state decisions regarding investments as well as decisions regarding procurement.

SUMMARY OF ARGUMENT

The *Amici* States urge this Court to adopt a bright line test in determining when to apply the market participant exception to the Commerce Clause. States are engaged in the marketplace as participants when they make procurement and investment decisions. Consequently, the market participant exception to the Commerce Clause applies. The Commerce Clause analysis,

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[4] For example, Iowa, Maryland, New Mexico, Ohio, Oklahoma, and Tennessee have some variety of a "Buy American" law. *See* Iowa Code Ann. § 18.3 (West Supp. 1999); Md. Code Ann., State Fin. & Proc. §§ 17-301 to 306 (1995); N.M. Stat. Ann. § 13-1-188 (Michie 1997); Ohio Rev. Code Ann. §§ 125.09, 125.11, 306.43(G), 5513.07 (Banks-Baldwin Supp. 1999); Okla. Stat. tit. 61, § 51 (West 1997); Tenn. Code Ann. § 54-5-135 (1998).

therefore, is complete. A bright line test provides clear direction to both the States and the courts in evaluating controls the States place on their own procurement and investment decisions.

The roots of the market participant exception to the Commerce Clause support the bright line test. The negative implication of the Commerce Clause, both its interstate and foreign aspects, is directed at limiting the States' authority to regulate commerce, not participate in it. The right of States as guardians and trustees for their people and the public fisc requires that the States have freedom in deciding what restrictions to place on the spending and investing of their money. Applying the market participant exception to the Commerce Clause any time the State is purchasing goods or services or investing its money preserves the right of States when acting in their proprietary role to be free from restrictions that do not affect private parties.

Federal statutes that regulate private entities in making procurement or investment decisions also may regulate a State's decisions in these areas. If so, the statutes apply directly to the States. It is not necessary to try to judge each State decision by whether a private party could or would make the same decision or consider the same factors in reaching a decision.

If this Court does not adopt the bright line test urged by the *Amici* States, an alternate test is proposed. Currently courts frequently look to whether a private business would be likely to act in the way the State is acting in making proprietary decisions. Instead the question should be rephrased: Could a private party legally act as

the State is acting? Stated in this way, the test more accurately reflects the underpinnings of the market participant exception to the Commerce Clause.

The philosophical bases for the market participant exception to the Commerce Clause apply with equal force to both the interstate and foreign aspects of the Commerce Clause. A State's decisions governing its procurement of goods and services or investment of its money constitute participation in the marketplace and not regulation. This does not change because it is foreign markets rather than interstate markets that may be affected. A State's interest in determining its own trading partners is not lessened because foreign commerce may be involved. A State's role as guardian and trustee for its people and of the public fisc is no less when decisions affect foreign commerce. The States' right to be free from restrictions which do not apply to private parties in making proprietary decisions is just as strong regardless of whether interstate or foreign commerce is involved. This case offers the Court the opportunity to clearly hold that the market participant exception applies to both the foreign and interstate aspects of the Commerce Clause.

The market participant exception also should prevent a State's proprietary actions in procuring goods or services or in investing its money from being invalidated under the federal government's foreign affairs power. Decisions that a State makes in these areas are not decisions that could prevent the federal government from exercising its foreign affairs power. The decisions may have an indirect effect on businesses of other countries, but they do not have a direct effect on the federal government's foreign affairs policy.

Further, Congress and the Executive Branch have exercised their foreign affairs power to provide a mechanism for addressing complaints that state laws violate international trade agreements. A process has been established within the trade agreements themselves to handle such complaints. Congress in the Uruguay Round Agreements Act specifically determined that private court action on any basis was inappropriate for complaints under or connected with the trade agreements. The Executive Branch in its Statement of Administrative Action, approved in the Uruguay Round Agreements Act, stated that such lawsuits themselves could interfere with the President's exercise of his foreign affairs power.

ARGUMENT

I. THIS COURT SHOULD ADOPT A BRIGHT LINE TEST IN DETERMINING WHEN TO APPLY THE MARKET PARTICIPANT EXCEPTION TO THE COMMERCE CLAUSE.

The history and public policy foundations of the market participant exception to the Commerce Clause support the application of a bright line test: applying the market participant exception any time a State is acting in its proprietary role making decisions regarding its procurement of goods or services or investment of its money.

The market participant exception to the dormant Commerce Clause, first expressed by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), has a long history. In 1898, the North Dakota Supreme Court addressed whether a state statute requiring that all

county printing be done within the State violated Article 1, Section 8 of the United States Constitution. *Knight v. Barnes*, 75 N.W. 904 (N.D. 1898). The court held that the statute did not violate the interstate Commerce Clause. It stated: "[A]s a question of principle, we are unable to see why the state is forbidden to do what an individual certainly may do with impunity, viz. elect from whom it will purchase supplies needed in the discharge of its corporate functions." *Id.* at 906.

Then, in *Atkin v. Kansas*, 191 U.S. 207 (1903), this Court held that the State, acting as guardian and trustee for its people in the control of the State's affairs, had the power to place conditions upon public work to be done on its behalf, or on behalf of its municipalities. *Id.* at 222-23. Writing for the Court's majority, Justice Harlan stated that the courts have no authority to review the conditions a State places on contracts for public works. "Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." *Id.* at 223. The Court further determined that the motives behind enactment of the statute were irrelevant and did not affect the State's authority. *Id.* at 222. *Cf. Ellis v. United States*, 206 U.S. 246 (1907) (speculation over Congress' motive in passing an act regulating the conditions under which the government would contract cannot be used to limit Congress' authority over government contracts). Summing up the majority decision in *Atkin*, the Court stated:

> We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state

> to prescribe the conditions under which it will permit work of that kind to be done.

191 U.S. at 224.

The principle proclaimed by this Court in *Atkin* – that a State, acting as guardian and trustee for its people, has the power to place conditions on contracts it enters – applies in the case of selective purchasing laws and any time a State acts in its proprietary role. Such application is in accord with the idea that a State, when acting as a contractor, has the same rights as any private contractor. Justice Holmes, writing for the majority in *Ellis*, 206 U.S. at 256, stated that the "government, purely as contractor, in the absence of special laws, may stand like a private person."

This Court's decision in *Heim v. McCall*, 239 U.S. 175 (1915), lends additional support to application of a bright line test. In *Heim*, this Court held that the State of New York had the authority to determine that only United States citizens may be employed in the construction of public works by the State, a municipality, or any person contracting with the State or municipality, and further that preference for such employment must be given to New York citizens. The Court relied upon the principle set forth in *Atkin* that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Id.* at 192-93. The Court also upheld the limitation on the construction of a treaty with Italy regarding the rights of Italian citizens within the United States. The Court of Appeals had concluded that the

treaty "does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys." *Id.* at 193. This Court determined that such a conclusion was inevitable based on the principles it had announced. *Id.*

Although *Atkin* and *Heim* addressed state action via public works, the Court in each case based its opinion on the State acting in its proprietary role and as a participant in the marketplace. Therefore, whether the State is entering a service contract, purchasing goods, or investing its money, the same principles apply. In each situation, the State acts in its proprietary role and as guardian and trustee of the public fisc.

In 1917 the Mississippi Supreme Court analyzed a state law restricting county officials from purchasing records and books from companies not engaged in the printing business in the State. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 76 So. 258 (Miss. 1917). In its Commerce Clause analysis, the court determined the statute did not attempt to regulate any contracts other than the State's own contracts. *Id.* at 260. After pointing out that a private entity has the right to enter a contract with whomever it chooses, the court determined that there is no specific provision of the Constitution requiring the State to enter into a contract with any person or corporation without the State's consent. Consequently, it held that the State cannot be forced to do so. *Id.* Further, the court noted that the statute expressly provided how both resident and nonresident citizens and corporations could qualify to sell to the State, become amenable to process in the State, and do the work within the State. *Id.*

The right of the government to act as any other business when it enters the marketplace was again addressed in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). In *Perkins* this Court stated: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127.

Although *Perkins* involved an act by the federal government, the principles involved apply equally to state governments when acting as market participants. The Court stated that the purpose of the federal act in *Perkins* was "to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment." *Id.* at 128. The Court emphasized that the act did not purport to regulate private businesses but only instructed the government agents with authority to fix the terms and conditions under which the government would purchase goods. *Id.* at 128-29.

This Court in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), identified several policy considerations underlying the market participant exception. The most important consideration was the absence of any "constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 437. Quoting from constitutional scholar Lawrence Tribe, this Court noted that "the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity." *Id.* This Court also identified

the following considerations as supporting the market participant exception to the Commerce Clause:

- Considerations of state sovereignty when the State is acting as guardian and trustee for the State's residents (citing *Heim*, 239 U.S. at 191);
- Considerations of fairness that dictate because state proprietary actions are burdened with the same restrictions as actions by private market participants, state proprietary actions also should receive the same freedom from federal constraints (citing *Senatobia*, 76 So. at 260, and *Tribune Printing & Binding Co. v. Barnes*, 75 N.W. 904, 906 (N.D. 1898) (cited supra as *Knight v. Barnes*));
- The right of a private business to choose its trading partners (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919));
- The practical difficulty in evaluating state proprietary activities under the traditional Commerce Clause analysis (as shown by the case before the Court in *Reeves*).

Reeves, 447 U.S. at 438-39. Each of these underpinnings of the market participant exception would be followed by the application of a bright line test.

Bright Line Test

The market participant exception to the dormant Commerce Clause protects the activities of a State acting in a proprietary manner. Because it is uncertain how a court will determine whether a State is acting purely in its proprietary role, it is important that this Court adopt a

bright line test. An appropriate test would apply the market participant exception to the dormant interstate and foreign Commerce Clause any time the State is involved in purchasing goods or services or investing its money. In these instances, the State acts in its proprietary role and as guardian and trustee of the State's assets, thus satisfying the *Heim* rationale. The effect on interstate or foreign commerce is indirect and does not amount to regulation of the private sector. Therefore, the purposes behind the Commerce Clause do not come into play.

This Court has already stated that when the market participant exception is involved, there is only one question: Is the State involved in the market as a participant? *Reeves*, 447 U.S. at 435 n.7. If it is, the action is exempt from Commerce Clause restrictions, and the degree of the effect of the State's proprietary decisions on interstate or foreign commerce is irrelevant. *Reeves*, 447 U.S. at 435-36. *See also White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204, 208 (1983) (reaffirming principle of single inquiry in market participant cases). This indeed sounds like a bright line test. The cases, however, show that the courts sometimes remain focused on questions of the motives of the State in enacting its laws, the degree of the effect of the laws on interstate or foreign commerce, or whether the State's actions go beyond participation in the marketplace to regulation. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 63-65 (1st Cir. 1999); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96-99 (1984); *Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (Discussion of

the market participant exception is largely dicta, however, because the Court found Wisconsin's law was preempted by the National Labor Relations Act).

Under the true bright line test recommended by the *Amici* States, the State's motives in enacting its statutes governing state procurement or investments are irrelevant. This is consistent with the principle followed in *Atkin*. Likewise, whether a private party would or could take the actions taken by the State in its procurement or investment decisions would not be the deciding factor in determining whether the market participant exception to the Commerce Clause applies. Although this would appear to vary from the rationale that States should be burdened only to the same extent as private parties, the end result, as discussed below, would be the same. In short, if the State is governing only its own procurement or investment decisions and practices, the market participant exception would apply.

The application of the Commerce Clause market participant exception to the States' actions completes the Commerce Clause analysis. It does not, however, eliminate other possible challenges to a State's action in proprietary matters. Other federal laws like the anti-trust laws, which apply to the States only when they are acting as market participants, would still apply. *See Wunnicke*, 467 U.S. at 101-02 (Rehnquist, J., dissenting). In most cases, if a private business were prohibited from taking certain actions by federal law, the same law could prohibit the State from taking those same actions. To the extent that Congress has exempted the States from restrictions that a federal statute places on private businesses, such Congressional determination should be

upheld. The courts, under those circumstances, should not rely upon a private party's inability to act in a certain manner as the basis for rejecting a State's proprietary action under the Commerce Clause. If federal statutes apply to the States, then those laws should be applied *directly* to the States. If the statutes do not apply to the States' actions by their terms, then the Commerce Clause should not be used to apply the statutes.

The Massachusetts Burma Law limits the State's procurement of goods and services from companies that do business with Burma. It does not regulate purchasing by private parties within the State. It does not prohibit private parties within the State from doing business with Burma. The statute governs only the State's spending of public funds to purchase goods and services. Therefore, under the bright line test recommended by the *Amici* States, the market participant exception to the Commerce Clause applies to Massachusetts' Burma Law. No further analysis is necessary under the Commerce Clause.

Alternate Test

If the Court chooses not to adopt the bright line test proposed by the *Amici* States, an alternative test exists. The alternate test still would provide an appropriate analysis for use by lower courts in applying the market participant exception to the Commerce Clause. Under the market participant exception, the courts have sometimes questioned whether the State is acting in the same way that a private party would act in contracting. One commentator has suggested that the more appropriate question would be whether a private party *could* act as the

State has acted. *See* Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 627 (1993).

Although this test is not the bright line advocated by the *Amici* States, it still retains the advantage of placing the States in the same position as private parties when it comes to contract matters. Additionally, the courts would not need to decide if or how often a private party would make the same contracting decisions – an area that has caused much debate. Any decision that a private party legally could make or any factor that a private party legally could take into consideration in making procurement or investment decisions also should be available to a State in making its procurements or investments. For instance, just as a company's motivation or purpose in making procurement or investment decisions or the effect of those decisions on foreign or interstate commerce would not be reviewable by a court, so too should such proprietary actions taken by a State be free from court review.

In *Colgate*, 250 U.S. 300, this Court evaluated, under the Sherman Act, the conduct of a manufacturer in limiting the persons to whom it would sell to those who resell only according to the manufacturer's guidelines. This Court recognized:

> [I]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and,

> of course, he may announce in advance the circumstances under which he will refuse to sell.

Id. at 307.

Using the test set forth in *Colgate*, Massachusetts' announcement in advance of the circumstances under which it will purchase goods or services from a business – that the entity does not engage in business with Burma – is an action a private company lawfully could take. Consequently, under the alternate test, Massachusetts is not prohibited by the Commerce Clause from taking such action because its action is covered by the market participant exception.

As Justice Scalia, joined by Justice Thomas, pointed out in his dissent in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996), state decisions about with whom to contract frequently will take into account the moral and political views of the government and the type of organizations it wishes to subsidize through its purchases. The *Amici* States strongly believe that the moral integrity of a potential trading partner is a legitimate concern to be considered by a State when acting as guardian of the public fisc.

II. THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE APPLIES EQUALLY TO INTERSTATE COMMERCE AND FOREIGN COMMERCE.

The Commerce Clause grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states." U.S. Const. art. 1, § 8. Consequently, the negative implication of this language relates only to

the *regulation* by States of commerce with foreign nations and among the several States. Nothing in the Commerce Clause, either expressly or by implication, denies the States the authority to conduct their own affairs, even if the conduct of those affairs has an effect on interstate or foreign commerce.

In *Hughes*, 426 U.S. at 805, 810, this Court stated:

> [W]e are not persuaded that Maryland's action in amending its statute was the kind of action with which the Commerce Clause is concerned. . . . Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Maryland amended its statute regarding the documentation needed by out-of-state processors to participate in a bounty program whereby the State paid for the abandoned vehicles delivered to scrap processors. Maryland did not interfere with the functioning of the interstate market by burdensome regulation or by prohibiting private activities. Rather, Maryland conditioned the State's purchase of automobile hulks on the receipt of certain documentation. This Court stated:

> Until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

426 U.S. 808.

In today's world of vast global markets, there are very few actions a State could take that would not somehow have an effect on foreign commerce. Only direct interference with foreign commerce, accomplished by state regulation of private industry, however, is prohibited by the dormant foreign Commerce Clause. As pointed out by the court in *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *summarily aff'd*, 409 U.S. 904 (1972), no company has a vested right to sell to the State. "Trade regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not." 339 F. Supp. at 725.

Likewise, this Court explained in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988), that it is only the actions which a State takes in its distinctive governmental capacity that are subject to the limitations of the negative Commerce Clause, not the actions a State takes in its more general role as a market participant. As Justice Rehnquist, writing for this Court in *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984), stated: "When the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise." (Emphasis in original.)

This Court's dicta in *Reeves* is the only indication that the market participant exception to the Commerce Clause might not apply to actions of States, in their proprietary role, that affect foreign commerce. In *Reeves* the Court stated it had no need to explore the application of the foreign Commerce Clause to state proprietary actions. 447 U.S. at 437 n.9. There is no constitutional or philosophical

reason why the market participant exception to the Commerce Clause should not apply equally regardless of whether it is interstate or foreign commerce that is affected.

This Court has never used the negative implication of the foreign Commerce Clause to strike down a state statute that controlled only procurement or investment decisions of a State or its political subdivisions. A State's proprietary decisions and its actions as a participant in the marketplace always have been respected as decisions that were the State's alone to make. Whether they affect interstate or foreign commerce, the procurement and investment decisions of a State are proprietary – not regulatory – actions. The *Amici* States call upon this Court to pronounce what always has been the unstated understanding of the States: When the States are acting as market participants, neither the foreign nor the interstate aspect of the Commerce Clause applies.

III. THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE IS APPLICABLE EQUALLY TO THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER.

The Federal Government's Foreign Affairs Power

The dormant foreign affairs power of the federal government as set forth by this Court in *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), stems from the foreign affairs powers the United States Constitution entrusts to Congress and the President. *Zschernig* is the only case in which this Court has used the federal government's "foreign affairs power" to strike down a state law. That case

involved a state statute that regulated who could inherit property within the State.

Applying the market participant exception to the federal government's "foreign affairs power", thus, does not mark a change in this Court's practice. Rather, until the instant case, the proper mix of facts and lower court holdings had not appeared before this Court to require a determination on the applicability of the market participant exception to the foreign affairs power of the federal government. Here, however, the Respondent is asking this Court to hold a State's procurement decisions are an interference with the federal government's foreign affairs power simply because they may have an effect on foreign commerce. This proposition is meritless.

As pointed out in Argument II above, in today's world of vast global markets, there are very few procurement decisions a State could make that would not somehow have an effect on foreign commerce. A decision preventing the States from determining their own trading partners because some companies or other governments do not like the decisions made would rewrite the entire history of state sovereignty and the principles of federalism.

The fact that the Massachusetts law in question applies equally to foreign and domestic companies that do business with Burma demonstrates that this is indeed a statute governing the State's own purchasing and is not a regulation of foreign commerce. Further, even if it were, it would not interfere with the federal government's power to regulate foreign affairs. Congress arguably could enact a law prohibiting any State, political subdivision, or private business from restricting purchases from,

or investments in, other countries or from companies that do business with specific countries. No state law can prohibit Congress or the Executive Branch from exercising its foreign affairs power.

Congress' And The Executive Branch's Exercise Of Their Foreign Affairs Power

Congress and the Executive Branch have exercised their foreign affairs power to establish a manner for addressing complaints that a State's actions violate international commitments. The international trade agreements entered into by the United States establish procedures for handling alleged violations by States and local governments. The Uruguay Round Agreements are an example. The Executive Branch and Congress have acted pursuant to their constitutional authority to establish a comprehensive system under the World Trade Organization for addressing complaints by member nations that the laws of the United States or her political subdivisions violate the Uruguay Round Agreements. The Implementation Bill and the Statement of Administrative Action, in fact, specifically prohibit a private cause of action, either directly or indirectly, attacking a State's law under, or in connection with, the Uruguay Round Agreements on any basis, including under Congress' Commerce Clause authority. 19 U.S.C. § 3512(c) (1994); H.R. Doc. No. 103-316, at 676 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4055.

The Statement of Administrative Action for the Uruguay Round Agreements Act, adopted by Congress in 19 U.S.C. § 3511(a)(2) (1994), further emphasizes:

> With respect to the states, section 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Uruguay Round Agreements. Suits of this nature may interfere with the President's conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under those agreements.

H.R. Doc. No. 103-316, at 676 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4055.

Actions by States that may violate the international trade agreements the United States has entered do not interfere with the federal government's foreign affairs power. Rather, the federal government, through the Executive Branch and Congress, has considered the possibility that state laws may do so and has established a system to address any such problems. In addition, Congress and the Executive Branch have stated that involvement by the judiciary, by itself, could interfere with the exercise of their constitutional foreign affairs powers.

CONCLUSION

For the foregoing reasons, the 22 *Amici* States respectfully request the Court to reverse the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

HEIDI HEITKAMP
Attorney General
State of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record
600 East Boulevard Avenue
Bismarck, North Dakota
58505-0040
(701) 328-2210

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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF MEMBERS OF CONGRESS, AMICI CURIAE: SENATORS BARBARA BOXER, EDWARD KENNEDY, JOHN KERRY, PAUL WELLSTONE, AND REPRESENTATIVES NEIL ABERCROMBIE, TAMMY BALDWIN, HOWARD BERMAN, DAVID BONIOR, SHERROD BROWN, MICHAEL CAPUANO, JULIA CARSON, WILLIAM CLAY, EVA CLAYTON, JOHN CONYERS, JOSEPH CROWLEY,

(Additional Members of Congress Listed on Inside Cover)

IN SUPPORT OF PETITIONERS & FOR REVERSAL

JOHN ECHEVERRIA
Counsel of Record
ROBERT STUMBERG
MATTHEW C. PORTERFIELD
THE HARRISON INSTITUTE
FOR PUBLIC LAW
GEORGETOWN UNIVERSITY
LAW CENTER
111 F Street, N.W.
Suite 102
Washington, D.C. 20001-2095
(202) 662-9603

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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DANNY DAVIS, PETER DEFAZIO, WILLIAM DELAHUNT, ROSA DELAURO, JULIAN DIXON, LANE EVANS, BARNEY FRANK, JIM GIBBONS, BENJAMIN GILMAN, LUIS GUTIERREZ, EARL HILLIARD, MAURICE HINCHEY, JESSE JACKSON, JR., STEPHANIE TUBBS JONES, MARCY KAPTUR, SUE KELLY, CAROLYN KILPATRICK, PETER KING, DENNIS KUCINICH, TOM LANTOS, BARBARA LEE, SHEILA JACKSON LEE, JOHN LEWIS, EDWARD MARKEY, MATTHEW MARTINEZ, JAMES McGOVERN, MARTIN MEEHAN, GREGORY MEEKS, JUANITA MILLENDER-McDONALD, GEORGE MILLER, PATSY MINK, JOSEPH MOAKLEY, JERRY NADLER, RICHARD NEAL, ELEANOR HOLMES NORTON, JAMES OBERSTAR, JOHN OLVER, MAJOR OWENS, BILL PASCRELL, NANCY PELOSI, THOMAS PETRI, RICHARD POMBO, DANA ROHRABACHER, ILEANA ROS-LEHTINEN, LUCILLE ROYBAL-ALLARD, BOBBY RUSH, BERNIE SANDERS, JANICE SCHAKOWSKY, CHRISTOPHER SMITH, MARK SOUDER, PETE STARK, TED STRICKLAND, BENNIE THOMPSON, JOHN TIERNEY, EDOLPHUS TOWNS, JAMES TRAFICANT, MARK UDALL, TOM UDALL, MAXINE WATERS, MELVIN WATT, HENRY WAXMAN, LYNN WOOLSEY, DAVID WU

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INTERESTS OF *AMICI CURIAE* MEMBERS OF CONGRESS [1]

Amici curiae are members of the United States Senate and the United States House of Representatives. *Amici* are concerned that the court of appeals has usurped the authority of Congress to determine whether to preempt state law based upon foreign commerce or foreign affairs concerns. *Amici* are also concerned that the court of appeals' decision could result in preemption challenges to numerous state and local laws that Congress has neither formed nor expressed the intent to preempt. *Amici* are further concerned that the court of appeals' preemption analysis could make it difficult for both courts and Congress to predict when federal legislation will be construed to preempt state law and could interfere with Congress's ability to craft flexible responses to the myriad ways in which state laws can implicate foreign commerce in this era of globalization.

Amici members of Congress have authorized this brief to be filed in their names through individual letters on file with counsel. Counsel for the petitioner, Commonwealth of Massachusetts, and counsel for the respondent, National Foreign Trade Council, have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In this case the National Foreign Trade Council (NFTC) is asking the federal courts to do what Congress has consistently refused to do: preempt state and local selective purchasing laws. The Court should reject this

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[1] As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of the brief. Funding for the preparation of this brief was provided through the institutional support of Georgetown University for the Harrison Institute for Public Law, which is a program for clinical legal education and public interest representation.

exercise in forum shopping among the branches of the federal government and reaffirm the principle that Congress, not the federal courts, has the primary authority under the Constitution to decide whether and when to preempt state law based upon foreign policy or foreign commerce concerns.

The court of appeals failed to apply the presumption against the preemption of state law. Instead, the court based its finding of preemption upon its own notions of the relative state and national interests involved rather than upon any evidence of congressional intent. The court of appeals also ignored significant evidence that Congress has repeatedly considered selective purchasing laws and refused to preempt them. Moreover, the court of appeals disregarded Congress's explicit preclusion of actions, such as this one, that are brought in connection with trade disputes over state law.

Deferring to Congress's refusal to preempt selective purchasing laws would permit this Court to avoid deciding whether the First or Tenth Amendments limit Congress's authority to preempt state market participation measures such as the Massachusetts selective purchasing law. It would also avoid placing the federal courts in the position of reviewing state contracting and investment decisions for their impact on foreign affairs or foreign commerce, which could strain the judicial branch's mandate under Article III to decide only discrete cases or controversies.

The court of appeals also extended the dormant commerce clause and dormant foreign affairs doctrines to cover market participation measures. Through both its broad reading of implied preemption doctrine and its expansion of the judicially created dormant commerce and dormant foreign affairs doctrines, the court of appeals

has redefined our system of federalism as one in which the federal courts rather than Congress serve as the primary arbiter of the division of power between the states and the federal government. *Amici* members of Congress urge this Court to reverse the decision of the court of appeals and restore to the Congress its constitutional role in maintaining the balance of federalism.

ARGUMENT

I. THE FEDERAL COURTS SHOULD DEFER TO CONGRESS'S REFUSAL TO PREEMPT STATE AND LOCAL SELECTIVE PURCHASING LAWS

A. There Is a Strong Presumption Against the Preemption of State Laws in Traditional Areas of State Authority Including State Market Participation Measures

As this Court has noted, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors*, 507 U.S. 218, 224 (1993), *quoting Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). In areas of traditional state authority this presumption against preemption may only be rebutted by a "clear statement" of Congressional intent to preempt. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

State market participation measures are an area of traditional state authority that this Court has been particularly reluctant to find preempted by federal law. *Cf. White v. Massachusetts*, 460 U.S. 204, 207 n.3 (1983) ("[r]estraint in this area is . . . counseled by considerations of state sovereignty, the role of each State 'as guardian and trustee for its people' . . . and 'the long recognized right of trader or manufacturer, engaged in

an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.") (citations omitted).[2] In *Associated Builders and Contractors, supra*, the Court rejected a claim that the National Labor Relations Act (NLRA) preempted a bid specification imposed by a Massachusetts state agency that would require its contractors involved in the cleanup of Boston Harbor to abide by a prehire collective-bargaining agreement. 507 U.S. at 220-222.[3] The Court stressed that the NLRA permits private employers in the construction industry to enter into prehire agreements (507 U.S. at 230) and concluded that the statute should not be construed to prohibit comparable conduct by states acting as employers: "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." 507 U.S. at 231-32.

Similarly, nothing in the federal Burma sanctions legislation expresses any intent to require state governments—or any private market participants—to maintain any particular type of economic ties with Burma. *See* Omnibus

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[2] The Court in *White* was discussing the basis for its refusal to extend the dormant commerce clause doctrine to cover state market participation measures. The status of market participation measures under the dormant commerce clause is relevant to the analysis of such measures under the implied preemption doctrine as well, since both inquiries require a court to decide whether—in the absence of a congressional statement of intent to preempt—to strike down a state law in order to prevent it from encroaching on an area of federal legislative authority.

[3] "Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees." 507 U.S. at 230.

Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009. Numerous private actors —including members of NFTC such as Liz Claiborne, Inc. and Levi Strauss & Co.—have decided to limit their economic ties to Burma in ways that are closely analogous to the Massachusetts selective purchasing law. *See* R. at 413-14. These private measures, like the Massachusetts selective purchasing law, are simply among the "free play of economic forces" that Congress left untouched in the federal Burma sanctions. *See Associated Builders and Contractors*, 507 U.S. at 232. It would be no more appropriate for this Court to construe the federal Burma sanctions to preempt the Massachusetts selective purchasing law than it would be to construe it to prohibit the analogous private economic measures.

B. *Hines v. Davidowitz* Did Not Create a Presumption in Favor of Preemption Under Federal Statutes Involving Foreign Affairs

The court of appeals attempted to justify its finding of preemption by citing *Hines v. Davidowitz*, 312 U.S. 52 (1941), which it construed to contain a "strong presumption that Congress intend[s] to preempt the field" when it legislates in areas affecting foreign policy. Pet. App. at 70. Nothing in *Hines*, however, suggests that the normal presumption against preemption is reversed when the relevant federal statute implicates foreign policy. Such a presumption in favor of preemption would conflict with numerous other decisions in which this Court has indicated that the presumption against preemption applies even when foreign affairs issues are implicated. *See, e.g., United States v. Pink*, 315 U.S. 203, 230 (1942). Instead, the Court in *Hines* merely considered the pervasiveness of federal statutory and treaty provisions related to aliens when considering whether a state law requiring

the registration of aliens conflicts with a federal law on the same subject. *See* 312 U.S. at 65-66.[4]

In addition, in *Hines*, the court stressed that "[t]he basic subject of the state and federal laws is identical—registration of aliens as a distinct group." 312 U.S. at 61. In contrast, the federal Burma sanctions and the Massachusetts laws apply to distinct issues. The federal Burma sanctions prohibit private investment in Burma and restrict United States aid to the Burmese government. The Massachusetts law affects only the award of Massachusetts state contracts; the law makes no attempt to assert the

[4] Admittedly, the Court's decision in *Hines* is not a model of clarity and provides little useful guidance for Congress or the courts concerning when federal legislation will be construed to preempt state law:

> This Court, in considering the validity of state laws in the light of federal laws touching the same subject, has made use of the following expressions: inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hines, 312 U.S. at 67. This *ad hoc* approach to preemption analysis has been the target of much criticism. *See, e.g., id.* at 75 (Stone, J., dissenting) ("it is difficult to overstate the importance of safeguarding against [the] diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted"); *Cf. Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988) ("[w]hile preemption under a theory of express or implied preemption is essentially a matter of statutory construction, preemption under a frustration of federal purpose theory is more an exercise of policy choices by a court than strict statutory construction.")

state's police power to regulate economic activity. Furthermore, the Court in *Hines* was confronted with a state statute that restricted the "rights, liberties, and personal freedoms of human beings" (312 U.S. at 68), not a statute that applied exclusively to state actions as market participant. Moreover, this Court indicated in *De Canas v. Bica*, 424 U.S. 351, 361-63 (1976) that the *Hines* approach to preemption analysis is not appropriate where, as here, there is evidence that Congress has permitted the type of state law at issue. *See infra* Section I(C).

If this Court were to accept the position of the court of appeals that *Hines* requires a presumption in favor of the preemption of the Massachusetts selective purchasing law, it would effectively transform the preemption analysis in certain cases from an attempt to determine congressional intent into an application of a *Zschernig*-like self-executing limitation on state power. This result would be of particular concern to the *amici* members of Congress because it would constitute a significant reallocation to the federal courts of Congress's constitutional authority to decide if and when to preempt state law.

C. Congress Has Refused to Preempt State and Local Selective Purchasing Laws and Has Specifically Prohibited Private Actions, Such as This One, That Are Brought in Connection With Trade Rules

There is no indication that Congress intended to preempt the Massachusetts selective purchasing law. To the contrary, there is substantial evidence that Congress has implicitly consented to state and local selective purchasing measures. As *amici* members of Congress discussed in their brief in support of Massachusetts' petition for certiorari, beginning with the debate over state and local anti-Apartheid measures during the 1980s, Congress has repeatly considered state and local selective purchasing laws

and has refused to exercise its authority to preempt them. *See* Brief of Members of Congress, Amici Curiae, in Support of the Petition for Certiorari at 3-8.

During the debate over the Comprehensive Anti-Apartheid Act of 1986, Congress rejected calls for the preemption of state and local anti-Apartheid laws. The House of Representatives, after extensive debate over state and local anti-Apartheid laws, passed a resolution stating that the federal sanctions on South Africa should not be interpreted to preempt any state or local measure. H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986).[5]

Congress not only refused to preempt state and local South Africa laws, it actually voted twice to permit state and local governments to limit the award of contracts on federally funded transportation projects in compliance with their South Africa selective purchasing laws. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440, Oct. 2, 1986, 100 Stat. 1089, § 606; Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, June 30, 1989, 103 Stat. 97 (undesignated paragraph entitled "State and Local Anti-Apartheid Policies").[6] Congress eventually revoked that permission in response to the democratic transition in

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[5] The resolution came in response to "eleventh hour" assertions that the federal sanctions would preempt state and local anti-Apartheid measures. *See Statement of Senator Edward Kennedy*, 132 Cong. Rec. 23291 (1986).

[6] Congress acted in response to a decision by the Department of Transportation to withhold millions of dollars from state and local jurisdictions with anti-Apartheid selective purchasing laws on the grounds that these laws violated the requirement that contracts on federally funded projects be awarded to the lowest bidder. *See* Brief of Members of Congress Amici Curiae in Support of the Petition for Certiorari at 5-6.

South Africa, but even then it refused to preempt the state and local measures, and instead merely "urge[d]" both state and local governments and participants in private boycotts to rescind their South Africa boycotts. *See* South African Democratic Transition Support Act, Pub. L. 103-149, Nov. 23, 1993, 107 Stat. 1503, § 4(c)(1).

Congress has similarly declined to preempt the Massachusetts selective purchasing law on Burma despite several opportunities to do so. The court of appeals noted that the Massachusetts law was passed three months before the federal Burma sanctions (Pet. App. at 10), and may have served as a "catalyst" for the federal Burma sanctions (Pet. App. at 73). The federal Burma sanctions, however, make no reference to the state or local measures let alone a "clear statement" of intent to preempt. Moreover, sanctions reform legislation that has been considered by Congress in recent years—and which the NFTC played a role in drafting—does not attempt to preempt state and local measures, presumably because there is no support in Congress for preempting selective purchasing laws. *See* Brief of Members of Congress, Amici Curiae, in Support of the Petition for Certiorari at 7-8. Accordingly, it would be inappropriate for this Court to infer such preemption. *See Barclays Bank P.C. v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994).

Moreover, in Section 102 of the Uruguay Round Agreements Act (URAA), Congress specifically precluded any private causes of action from being brought in connection with disputes under the World Trade Organization (WTO). See 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1). *See also* Brief of Members of Congress, Amici Curiae, in Support of the Petition for Certiorari at 8-10. Nonetheless, in its Complaint the NFTC *stressed* the alle-

gations made by the European Union and Japan that the Massachusetts law violated the United States' obligations under the WTO. *See* Complaint at 8. Both the district court and the court of appeals similarly relied upon the trade complaints in striking down the Massachusetts law. *See* Pet. App. at 24-26, 81-82.

The court of appeals dismissed the significance of Section 102 of the URAA by suggesting that it only prohibits actions based *directly* upon WTO rules. *See* Pet. App. at 26. This narrow reading ignores the clear language of Section 102, which states that "it is the intent of Congress . . . *to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements.*" 19 U.S.C. § 3512(c)(2) (emphasis added). Even if this language could somehow be construed to leave any doubt regarding Congress's intent to preclude trade rules from being used in support of private challenges to state law, that doubt would be resolved by the Statement of Administrative action for the Uruguay Round Agreements Act (SAA) that was enacted into law as part of the URAA. *See* 19 U.S.C. § 3511(a). The SAA, which constitutes the "authoritative expression by the United States concerning the interpretation and application of the (URAA[in any judicial proceeding" (19 U.S.C. § 3512(d)), states unambiguously that WTO rules may not be used "directly or indirectly" in a private action, including an action based on "Congress's Commerce Clause authority." SAA, *reprinted at* 1994 U.S.C.C.A.N. 4440, at 20.

The court of appeals has thus displaced Congress's decisions regarding the preemption of state law under two different statutes. It construed the federal Burma sanctions to preempt the Massachusetts selective purchasing law where no such intent is expressed or implied, and it

ignored Congress's explicit preclusion of all private causes of action brought "in connection with" trade rules.[7]

II. THE FAILURE OF THE COURT OF APPEALS TO DEFER TO CONGRESS'S REFUSAL TO PREEMPT STATE AND LOCAL SELECTIVE PURCHASING LAWS UNDERMINES CONGRESS'S CONSTITUTIONAL ROLE IN PROTECTING STATE SOVEREIGNTY, WHICH THIS COURT RECOGNIZED IN *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

The court of appeals—both through its conclusion that Congress has somehow silently preempted the Massachusetts selective purchasing law and its expansion of the dormant foreign affairs and dormant commerce clause doctrines to cover state market participation measures—has decided this case in a manner that significantly undermines Congress's ability to perform its role as guardian of our system of federalism. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court noted that under the Constitution, the protection of state sovereignty is primarily committed to the federal political process, which is responsive to the interests of the states because of their role in selecting both of the political branches of the government. *Id.* at 550-51.[8] In order for Congress to serve its role as

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[7] A different case would be before this Court if the Executive Branch had exercised the authority delegated to it by Congress under the URAA to challenge the Massachusetts law on the grounds of its alleged inconsistency with trade rules. *See* 19 U.S.C. § 3512(b)(2). The Executive Branch, however, has chosen not to exercise that delegated authority.

[8] *See Printz v. United States*, 521 U.S. 898, 956 (1997) (Stevens, J., dissenting):

> As we explained in *Garcia* . . . "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal

guardian of our system of federalism, however, the federal courts must refrain from interpreting federal statutes to preempt state law in the absence of clear evidence of congressional intent to do so. As Justice O'Connor observed in *Gregory v. Ashcroft*, 501 U.S. 452 (1991),

> inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Id. at 464, *quoting* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25,, p. 480 (2d ed. 1988).

Justice Souter has similarly noted that the clear statement rule is necessary to ensure that the federal political process adequately protects the states:

> The Court has repeatedly stated its assumption that insofar as the relative positions of States and Nation may be affected consistently with the Tenth Amendment, they would not be modified without deliberately expressed intent. . . . The plain-statement rule, which assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision is particularly appropriate in light of our primary reliance on "[t]he

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Government was designed in large part to protect the States from overreaching by Congress." . . . Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents.

> effectiveness of the federal political process in preserving the States' interests."

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 183 (1996) (Souter, J., dissenting), *quoting Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985) (additional citations and quotation marks omitted). *See also* Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. Pitt. L. Rev. 805, 818 (1998) ("Political process federalism, with its attendant requirement that Congress stand directly accountable for alterations of the federal-state balance, severely undermines the viability of implied preemption theories.")

By striking down the Massachusetts selective purchasing law despite the clear evidence that Congress has consistently refused to preempt state and local selective purchasing laws, the court of appeals usurped Congress's constitutional role in maintaining the balance of federalism. As Professor Tribe observed in response to claims that state and local market participation measures concerning South Africa were implicitly preempted by federal sanctions on South Africa:

> [t]o infer preemption in such circumstances would entail a delegation of extraordinary power to the courts. Such an interpretation would force courts to employ their own notions of state sovereignty in delineating the boundaries of the preemption by the federal government. This role would be at odds with the view of federalism espoused by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* . . . which envisioned a scheme that relies upon the political branches of the federal [government] to protect state sovereignty.

Laurence H. Tribe, *Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986*

upon State and Local Measures, 132 Cong. Rec. 23292, 23294 (1986).

The lines between international affairs and the legitimate powers of state governments are becoming increasingly difficult to discern in this era of globalization.[9] Now more than ever it is appropriate for the federal courts to defer to Congress's constitutional role in determining where those lines should be drawn.

As Justice Breyer has recently noted,

> courts cannot easily draw the proper basic lines of authority. The proper local/national/international balance is often highly content specific. And judicial rules that would allocate power are often far too broad. Legislatures, however, can write laws that more specifically embody that balance. Specific regulatory schemes, for example, can draw lines that leave certain local authority untouched . . . . That is why the modern substantive federalist problem demands a flexible, context-specific legislative response . . . .

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S.Ct. 2219, 2239 (1999) (Breyer, J., dissenting).

[9] *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1247-48 (1999):

> In recent years there has been a marked blurring of the distinction between foreign and domestic affairs; so fast has the line eroded—hastened by the communications revolution, the greater ease of travel, and the growing priority of trade over traditional national security issues—that globalization has become almost an instant cliche. The international arena is now very much of local interest, as reflected in the dramatically heightened profile of state and local governments on the world scene. This is particularly pronounced in matters relating to trade and investment. One in six private-sector jobs in the United States is now linked to the global economy. The number of Americans working for foreign companies in the United States now stands at five million; foreign direct investment in the United States has quadrupled since 1981. Subfederal jurisdictions now see international trade and foreign investment as critical to their economic well-being. They complete ferociously for foreign investment with tax breaks and other incentives. Most states now maintain at least one trade office abroad; many have concluded trade-related agreements with foreign entities; and the foreign trade mission has become a standard responsibility for governors and large-city mayors.

Congress created precisely such a "flexible, content-specific legislative response" to the preemption of state law in Section 102 of the URAA (19 U.S.C. § 3512). Section 102 contains several provisions that are intended to ensure that the federal political process adequately considers the interests of the states before their laws are struck down based upon trade disputes. Section 102's most important procedural protections are the assurances that only the Executive Branch, and not private parties, may sue to preempt state laws in connection with trade rules (19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1)), and that the Executive Branch may only bring such a challenge after consulting with Congress (19 U.S.C. § 3512 (b)(2)(C)). *See supra* Section I(C). Striking down the Massachusetts law in disregard of these procedures would both frustrate the specific scheme created by Congress for resolving disputes like this, and impair the ability of the federal political process to protect the sovereignty interests of the states as envisioned by the Court in *Garcia*.

III. CONCLUDING THAT CONGRESS INTENDED TO PREEMPT THE MASSACHUSETTS SELECTIVE PURCHASING LAW WOULD REQUIRE THIS COURT TO REACH CONSTITUTIONAL QUESTIONS THAT NEED NOT BE DECIDED IN THIS CASE

Application of the clear statement rule in this case would also permit this Court to avoid an interpretation of the federal Burma sanctions that could raise serious

constitutional questions. *See Richardson v. United States*, 119 S.Ct. 1707, 1711 (1999) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"), *quoting Gomez v. United States*, 490 U.S. 858, 864 (1989). *See also Department of Commerce v. United States House of Representatives*, 119 S.Ct. 765, 779 (1999) ("if there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"), *quoting Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944). *See also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").[10]

Application of the clear statement rule would require this Court to conclude that Congress has neither formed nor anywhere expressed the intent to preempt state and local selective purchasing laws, but rather has implicitly consented to such laws. *See supra* Section I(C). If the Court concludes that Congress has implicitly consented to state and local selective purchasing laws, it need *not* consider whether to strike down the Massachusetts law in order to preserve Congress's constitutional authority to regulate foreign commerce and foreign affairs. *See Barclays Bank P.C. v. Franchise Tax Bd. of California*, 512

[10] The court of appeals opinion is difficult to reconcile with this "deeply rooted" doctrine of judicial restraint. The opinion devotes fiifty pages (Pet. App. at 14-63) to its determinations that the Massachusetts law violates the dormant foreign affairs and commerce clause doctrines, before concluding, almost as an afterthought, that the law is also preempted by the federal Burma sanctions (Pet. App. at 64-73).

U.S. 298 (1994).[11] Similarly, the Court need not determine whether the market participation doctrine protects selective purchasing laws from challenge under the dormant foreign commerce and dormant foreign affairs doctrines. Moreover, if this Court defers to Congress's implicit consent to selective purchasing measures it need not address the status of selective purchasing laws under the First and Tenth Amendments.

Conversely, if this Court were to hold (despite the overwhelming evidence to the contrary) that Congress intended to preempt the Massachusetts selective purchasing law, in order to give effect to that preemptive intent it would need to determine that the Massachusetts law is not protected from federal regulation under either the First or Tenth Amendments. Moreover, if the Court determined that Congress has somehow implicitly preempted state and local market participation measures related to Burma, it would require the federal courts to review a wide variety of investment and purchasing decisions that might be difficult to reconcile with the courts' proper role under Article III of the Constitution.

A. Interpreting the Federal Burma Sanctions to Preempt the Massachusetts Selective Purchasing Law Would Require This Court to Determine Whether the Authority of Congress to Regulate the States Is Limited by the First Amendment

The court of appeals rejected the assertion that the Massachusetts selective purchasing law was a form of

[11] The Court in *Barclays* rejected arguments based upon both the dormant commerce clause and *Zschernig*'s dormant foreign affairs doctrine. *See, e.g.*, Petitioner's Brief for Barclays Bank PLC, at 32, 42-43, 1993 WL 639306 (December 15, 1993) (asserting *Zschernig*). The doctrine most closely associated with dormant foreign affairs preemption—the "act of state" doctrine—is similarly subject to congressional modification. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 443 (1986).

political expression entitled to protection under the First Amendment. Pet. App. at 40-41. In the court of appeals, Massachusetts argued that "the purpose and spirit of the First Amendment are embodied in selective purchasing laws." *See* Brief for Defendants-Appellants at 42, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304), *citing NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (holding that the First Amendment protects politically motivated economic boycotts).[12] An amicus brief submitted by the City of Berkeley explored the First Amendment issue in detail. The Berkeley brief argued, *inter alia*, that the framers understood the First Amendment to protect politically motivated boycotts—such as the colonial nonimportation boycotts—and that the First Amendment was intended to function as a limit on the new federal government's ability to regulate the states as well as individuals.

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12 Several commentators have similarly suggested that state and local selective purchasing and investing laws are a form of protected activity under the First Amendment. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1 (1999); Jay A. Christofferson, *The Constitutionality of State Laws Prohibiting Contractual Relations with Burma, Upholding Federalism's Purpose*, 29 McGeorge L. Rev. 351, 361-63 (1998); Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 Foreign Policy 158, 163 (1992) ("The First Amendment guarantee[s] the rights of all citizens, including governors, mayors, and their employees, to speak out on foreign policy"); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l L. 821, 829 (1989) ("at least some of these [state and local foreign policy initiatives] appear to implicate significant freedom of speech and petition values. Their real addressee is not some foreign government but our own U.S. policymakers, and their real purpose is not to intrude into the conduct of our foreign relations but to influence the making of our foreign policy . . ."); Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 Temple L. Rev. 813 (1989).

See Brief For Amicus Curiae City of Berkeley Supporting Reversal at 14-16, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304).[13]

Rather than address these arguments in detail, however, the court of appeals dismissed the First Amendment argument based primarily upon its observation that the Court in *Zschernig v. Miller*, 389 U.S. 429 (1968) had not addressed the issue. Pet. App. at 40-41. Moreover, the court of appeals held open the possibility that even a state resolution simply condemning Burma's human rights record might be struck down (*id.* at 41 n.18). Although this Court would presumably give the question of state and local government rights under the First Amendment more careful consideration if it reached the issue, it can avoid addressing the issue prematurely by deferring to Congress's decision not to preempt state and local selective purchasing laws.

B. Interpreting the Federal Burma Sanction to Preempt the Massachusetts Selective Purchasing Boycott—But Not to Prohibit Comparable Private Boycotts—Could Create a Conflict With This Court's Tenth Amendment Jurisprudence

An interpretation of the federal Burma sanctions that prohibited the Massachusetts selective purchasing law but permitted analogous private economic measures would also create a significant potential for conflict with this Court's Tenth Amendment jurisprudence. *See Printz v. United States*, 521 U.S. 898 (1997). Accordingly, such an interpretation should be avoided. *See Gregory v. Ash-*

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13 Other *amici* also addressed the status of selective purchasing laws under the First Amendment. *See also* Brief of Amicus Curiae States North Dakota *et al.* at 2 and 11, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304); Brief for Amicus Curiae Earthrights International at 15-16, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304).

croft, 501 U.S. 452, 464 (1991) (application of the plain statement rule appropriate when it would avoid constitutionally problematic exercise of the commerce power).

The Court in *Printz* indicated that it may be appropriate to consider the strength of the federal interests involved when considering whether a federal law of general applicability unduly intrudes upon state sovereignty. 521 U.S. at 932. In contrast, federal laws that are specifically targeted at regulating the states rather than private actors are virtually *per se* invalid:

> [w]here . . . it is the whole object of the law to direct to functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that defect.

Id. See also White v. Massachusetts, 460 U.S. 204, 207 n.3 (1983) ("state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, states should similarly share existing freedoms from federal constraints . . .") *quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980).

The non-targeting principle of *Printz* does not interfere with Congress's authority to preempt state *regulation* of private activity, since private parties do not possess anything analogous to the police power of states—*i.e.* the power to compel compliance with governmental standards under penalty of law. Conversely, the non-targeting principle should have particular force when states are buying and selling goods and services in the marketplace like private actors, and where comparable private economic

decisions presumably could not be prohibited. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

The conclusion that interpreting the federal Burma sanctions to preempt the Massachusetts selective purchasing law would conflict with the non-targeting principle of *Printz* cannot be avoided by resorting to the court of appeals' tortured conclusion that the purchasing law somehow constitutes regulation. The court of appeals suggested that under *Wisconsin v. Gould*, 475 U.S. 282 (1986), state market participation measures may sometimes be construed as "regulation" subject to federal preemption even when comparable private market participation measures are permitted. *See* Pet. App. at 47-48. Gould involved a Wisconsin statute that debarred repeated violators of the National Labor Relations Act (NLRA) from eligibility for state contracts. 475 U.S. at 287-88. The primary defect of the Wisconsin statute at issue in *Gould* was that it supplemented federal sanctions under the NLRA that Congress has intended to be exclusive. The Massachusetts selective purchasing law, in contrast, was enacted three months *before* Congress enacted the federal Burma sanctions, and thus cannot conceivably be interpreted as an attempt to enforce the federal sanctions.

The distinction between states acting as market participants and states exercising their regulatory police powers constitutes a clear line that provides guidance to both the courts and Congress regarding the allocation of power between the state and federal governments. This Court should reject the court of appeals' attempt to blur that line beyond recognition. As Chief Justice Rehnquist noted regarding a similar effort to extend the dormant commerce clause to cover state market participation activities, the attempt to recharacterize market measures as regulation is "both artificial and unconvincing," and the rational offered by the court of appeals in defense of

its conclusion that the Massachusetts selective purchasing law constitutes regulation is "merely a restatement of the conclusion." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 12 and n.1 (1984) (Rehnquist, J., dissenting, joined by O'Connor, J.).[14]

C. A Finding of Preemption Would Strain the Capacity of the Federal Courts Under Article III to Decide Cases and Controversies

A ruling that the federal Burma sanctions preempt state and local market measures related to Burma would place the federal courts in a position that would strain their role under Article III of the Constitution. Different state and local jurisdictions have addressed their economic ties with Burma in different ways. Some have merely passed resolutions denouncing the Burmese government. Some jurisdictions have limited investment in companies doing business in Burma, and others, such as Massachusetts, have given preferences in the award of state contracts to businesses that do not do business in Burma. Some have done both. *See* statutes cited in Memorandum for Respondent National Foreign Trade Council at 4 n.4.

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[14] *See also Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 U.S. Op. Off. Legal Counsel 49, 57 (April 6, 1986):

> The plurality opinion in *South-Central Timber* . . . is not binding precedent, and we believe that not all of its reasoning flows logically from the structure of the market participation doctrine. Wherever the state exercises its power as a buyer or investor to impose some contractual term on a company with which it deals, it is acting as in its proprietary rather than regulatory capacity. The kind of contractual condition the state chooses to impose should not affect the application of the market participation doctrine, given the rationales supporting the doctrine.

These types of decisions do not easily lend themselves to judicial review. *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("the competing considerations in cases involving state propriety action often will be subtle, complex, politicially charged and difficult to assess . . . as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.") [15]

This Court can avoid all of these constitutional issues simply by deferring to Congress's decision not to preempt state and local selective purchasing laws. If Congress chooses at some time in the future to preempt all or some

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[15] As Professor Tribe noted in regard to similar arguments concerning state and local anti-Apartheid measures, to infer such broad preemption without guidance from Congress on the scope of the preemption would require the federal courts to decide

> extraordinarily touchy and complex questions [such] as whether a particular state or city acts improperly when it decides to slow down its rate of investing pension funds in a particular company doing business in South Africa. Is the state or city acting in a preempted manner if it is motivated wholly or partly by moral concerns about apartheid? What if its concerns are purely prudential but are infused, as even prudence must be these days, by recognition that the situation in South Africa is unstable in part because of apartheid and the world's reaction to it? If a decision to slow down the rate of future investment is not preempted, what of a decision to diversify existing investments?
>
> For federal judges to review state and local investment portfolios from this perspective would be difficult at best and incompatible with the Article III judicial power at worst. As the Supreme Court has observed on numerous occasions, such judicial line-drawing is strongly disfavored in the foreign policy realm, an area of particular executive and legislative expertise. . . . Until or unless Congress explicitly demonstrates which of the broad array of state and local measures affecting South Africa it intends to preempt, the judiciary should not be forced to pick and choose without more guidance.

Laurence H. Tribe, *Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 upon State and Local Measures*, 132 Cong. Rec. 23292, 23294 (1986).

types of these laws, it can do so in a manner that reduces the chance for constitutional conflict and provides sufficient guidance to the courts to enable them to determine which laws Congress has chosen to preempt.

IV. THIS COURT SHOULD NOT EXPAND THE JUDICIALLY CREATED DORMANT COMMERCE CLAUSE AND DORMANT FOREIGN AFFAIRS DOCTRINES TO PRECLUDE STATE MARKET PARTICIPATION MEASURES

The court of appeals held that, in addition to being implicitly preempted by the federal Burma sanctions, the Massachusetts law was also invalid as an intrusion upon the federal commerce and foreign affairs powers. *See generally* Pet. App. at 14-63. This Court should reject the court of appeals' extension of the judicially created dormant commerce clause and dormant foreign affairs doctrines to reach state market participation measures.

This Court has recognized a market participation exception to the dormant effects of federal powers under the Constitution because "there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the market." *Reeves, Inc. v. Stake*, 447 U.S. 437 (1980). *See also College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2230 (1999) (the justification for the dormant commerce clause "is entirely absent where the States are buying and selling in the market.") This observation applies with equal force regardless of whether the dormant interstate commerce clause, the dormant foreign commerce clause, or the dormant foreign affairs power is involved.[16]

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[16] *See Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 U.S. Op. Off. Legal Counsel 49 (April 6, 1986) at 54 ("nothing in the historical record suggests that the Framers were concerned with state proprietary actions affecting either foreign or interstate commerce"), and at 62 ("[t]he historical rationale for the general federal power over foreign affairs does not imply the displacement of state proprietary powers").

No precedent requires the application of these doctrines to limit the states when they are acting as market participants. The Court in *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980) noted that it not had yet "explore[d] the limits imposed on state proprietary actions by the 'foreign commerce' Clause . . . ." Similarly, *Zschernig v. Miller*, 389 U.S. 429 (1968), which remains the sole application by this Court of the dormant foreign affairs doctrine created in that case (*see* Pet. App. at 3), did not involve state proprietary action.[17]

It is arguably inaccurate to refer to the market participation doctrine as an "exception," given that both the dormant commerce clause and the dormant foreign affairs doctrines are judicial creations. Instead, the market participation doctrine might be more properly characterized as an illustration of the general rule that "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." *Alden v. Maine*, 119 S.Ct. 2240, 2259 (1999), *quoting Nevada v. Hall*, 440 U.S. 410, 425 (1979). Accordingly, if the Court were to extend the dormant commerce clause to restrict state market participation measures, it

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[17] The dormant foreign affairs doctrine is arguably even less worthy of expansion than the dormant commerce clause, since it lacks the commerce clause's base in a specific provision of the Constitution. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 10-14 (1999). Moreover, this Court's decision in *Barclays Bank P.C. v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994) has been widely interpreted as either severely limiting or effectively overruling *Zschernig*. See Brief of Amici Members of Congress in Support of the Petition for Certiorari at 12 and n.13.

would constitute a significant usurpation of power by the federal courts to the detriment of the constitutional authority of both Congress and the states.

CONCLUSION

This Court is engaged in an ongoing debate concerning the extent to which the Constitution contains substantive limitations on Congress's ability to regulate the states in addition to the procedural protections recognized in *Garcia*. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997). In this case, however, there is no need to resolve that debate. Congress has made no effort to displace Massachusetts' exercise of its proprietary authority through its selective purchasing law. The result the NFTC is seeking—an interpretation of our system of federalism that permits the courts rather than Congress to preempt state market participation measures based upon an assessment of the competing state and national interests involved—is consistent with neither the "process' view nor the "substantive limits" view of federalism.

On occasion, concerns over the effects of state legislation on foreign commerce or foreign affairs will require Congress to exercise its preemptive power. Yet until Congress makes a clear statement of its intent to do so, the federal courts have neither the competence nor the constitutional mandate to determine whether state law should be preempted in deference to national interests.

Accordingly, this Court should reverse the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

JOHN ECHEVERRIA
Counsel of Record
ROBERT STUMBERG
MATTHEW C. PORTERFIELD
THE HARRISON INSTITUTE
FOR PUBLIC LAW
GEORGETOWN UNIVERSITY
LAW CENTER
111 F Street, N.W.
Suite 102
Washington, D.C. 20001-2095
(202) 662-9603

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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES, ORGANIZATION FOR INTERNATIONAL INVESTMENT, NATIONAL ASSOCIATION OF MANUFACTURERS, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN FARM BUREAU FEDERATION, AND CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT

Daniel M. Price
Counsel of Record
Marinn F. Carlson
POWELL, GOLDSTEIN, FRAZER & MURPHY LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
Tel: (202)347-0066

(Additional Counsel Listed on Inside Cover)

Balmar Legal Publishing Services, Washington, DC 202-682-9800

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35pp

Of counsel:
Robin S. Conrad
National Chamber
Litigation Center, Inc.
1615 H Street NW
Washington, DC 20062
Tel: (202)463-5337

Jan Amundson
Quentin Riegel
National Association of
Manufacturers
1331 Pennsylvania Ave. NW
Washington, D.C. 20004
Tel: (202)637-3058

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the U.S. Court of Appeals for the First Circuit correctly held that the Commonwealth of Massachusetts's selective purchasing law targeting commerce with Burma violates the Constitution's Foreign Commerce Clause, unconstitutionally infringes upon the federal government's exclusive authority over foreign affairs, and is preempted by federal Burma sanctions legislation?

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BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.3(a on written consent of all parties, the Chamber of Commerce of the United States, Organization For International Investment, National Association of Manufacturers, American Insurance Association, American Farm Bureau Federation, American Petroleum Institute, United States Council for International Business, and Chemical Manufacturers Association, respectfully submit this brief *amici curiae* in support of Respondent.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations that have substantial common interests in ensuring stable and predictable legal regimes affecting international trade and investment, and in promoting policies that secure for their members and the nation the benefits of free trade. Most of these organizations participated as *amici curiae* on appeal before the U.S. Court of Appeals for the First Circuit. In addition, the Chamber of Commerce of the United States and the Organization For International Investment participated as *amici curiae* in the proceedings before the U.S. District Court for the District of Massachusetts.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3 million U.S. businesses and organizations, with 140,000 direct members, of every size, sector, and region.[2]

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[1] Pursuant to Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

[2] Some members of the Chamber and the Organization For International Investment are also members of Respondent National Foreign Trade Council. Memberships may also overlap among the *amici*.

While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. Currently, 87 American Chambers of Commerce abroad in 77 countries are affiliated with the Chamber. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization For International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States. Members of OFII transact business throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all workers in the U.S. manufacturing sector and produce more than 80% of the nation's manufactured goods. An additional 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The United States Council for International Business ("USCIB") advances the global interests of American business both at home and abroad. As the U.S. affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organisation of Employers, USCIB officially represents U.S. business positions both in intergovernmental bodies—such as the WTO, ILO, OECD, and U.N. system—

and vis-à-vis foreign business communities and their governments. The USCIB addresses a broad range of policy issues with the objective of promoting an open system of world trade, finance, and investment. The USCIB membership consists of some 300 global corporations, professional firms, and business associations.

The American Insurance Association ("AIA") is a trade association representing more than 300 companies writing property and casualty insurance throughout the United States and around the world. AIA member companies are affiliated with more than 79,000 independent insurance agents in the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members, to provide a forum for discussion of policy problems of common concern to its members and the insurance industry, and to serve the public interest by participating in litigation that is of significance to the insurance industry.

The American Petroleum Institute ("API") is a non-profit trade association representing over 400 members involved in all aspects of the petroleum industry, including exploration, production, refining, transportation, and marketing. Many of API's members conduct business in foreign countries, and consequently have a direct interest in assuring that access to foreign markets is not unduly restricted by U.S. state and local regulations. In order to ensure that the United States continues to have diverse and ample sources of energy supplies, energy companies must be able to explore new frontiers, and to participate in international trade and investment.

The American Farm Bureau Federation ("AFBF") is an agricultural membership organization formed to represent the business, economic, social, and educational interests of its members which is comprised of Farm Bureaus in all fifty states, Puerto Rico, and nearly 2,800 counties. With a membership approaching five million families, the AFBF is the nation's largest farm organization. Founded in 1919, AFBF's primary activities include lobbying, public relations,

litigation, issue analysis and research, and personal and professional development of member farmers and ranchers. America's farmers have vital interests in the free flow of U.S. agricultural products in foreign commerce.

The Chemical Manufacturers Association ("CMA") is a nonprofit trade association that represents 90% of the productive capacity for basic industrial chemicals in the United States. Exports of chemicals and related products totaled $70 billion in 1999, larger than any other sector in the United States. The industry has a cumulative trade surplus of over $170 billion over the last decade, built on the strength of its role in global commerce.

In aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States, and, indirectly, much of the U.S. workforce. The *amici* are umbrella organizations charged with representing the legal and policy interests of their members in matters of national import—such as this litigation. The Massachusetts "Burma" statute and other similar state and local economic sanctions laws have had, and if the legal principles recognized by the First Circuit are not affirmed, will continue to have, a serious financial impact on many of the companies represented by the *amici*. Such measures fragment the markets in which *amici*'s members transact the world's business, and undermine the U.S. foreign economic policies on which those markets depend. If unchecked, they will proliferate, not merely burdening *amici*'s members, but harming the country as a whole.

SUMMARY OF THE ARGUMENT

The Commonwealth of Massachusetts has wielded the substantial economic leverage of its $2 billion procurement budget to implement its own foreign policy agenda—with grave and, *amici curiae* contend, unconstitutional consequences for international affairs and foreign commerce.

Specifically, Massachusetts created a blacklist of companies engaged, however remotely, in commerce with Burma[3] and refused to do business with them in an explicit effort to influence patterns of foreign commerce and the domestic policies of the Burmese government. That secondary boycott (an especially powerful and controversial tool of foreign economic relations) necessarily fragments the flow of interstate and foreign commerce. Because of the Massachusetts Burma Law and similar measures—more than twenty additional state and local selective purchasing sanctions, with others waiting in the wings—companies are forced to forfeit either international markets or state and local government procurement opportunities. The proliferation of these measures also impairs the ability of the United States to speak coherently and forcefully in foreign affairs. The Massachusetts Burma Law thus substantially burdens and discriminates against interstate and foreign commerce, and impermissibly intrudes upon the federal government's conduct of foreign relations.

The pursuit of foreign policy objectives, and the impairment of foreign commerce as a means to that end, are not and cannot be among the prerogatives of the several states. The Constitution entrusts the nation's diplomatic and foreign economic relations exclusively to Congress and the President—that is, to *national* policymakers. The U.S. Court

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[3] In June 1989, the Burmese government decreed that the country's name be changed from the Union of Burma to the Union of Myanmar. For convenience, however, this brief refers to "Burma" throughout.

of Appeals for the First Circuit correctly applied the precedents of this Court and upheld this bedrock principle of our system of government. *NFTC v. Natsios*, 181 F.3d 38 (1st Cir. 1999, *aff'g NFTC v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998.

Amici curiae respectfully urge the Court to affirm the decision of the court of appeals that states and localities may not enact selective purchasing laws that infringe upon the federal government's authority over foreign affairs, that discriminate against foreign commerce, or that are preempted by federal legislation.

ARGUMENT

I. The Court of Appeals Correctly Decided the Case, Thereby Averting Fragmentation of Interstate and Foreign Commerce and Interference with Foreign Policy

This appeal presents the constitutional questions of whether state and local governments may properly implement their own foreign policy agendas, and whether they may substantially burden not only foreign and interstate commerce but also the entire country's foreign relations in order to do so. *Amici curiae* contend that the court below correctly answered these questions in the negative, and they respectfully urge this Court to do the same.

Before turning to the merits of this appeal, it is important to clarify what this case is *not* about. Specifically, it is not about the propriety of the Burmese government's political and labor practices. To the contrary, *amici* are in full agreement with the Commonwealth of Massachusetts and others[4] that the government of Burma has violated basic political and human rights norms and that its conduct should be condemned. Nor

[4] *See, e.g.*, Brief of Nonprofit Organizations, *Amici Curiae*: Alliance for Democracy, Catholic Foreign Mission Soc. of America, *et al.* at 13-15.

is this case about the propriety of the *federal* sanctions on trade and investment with Burma that have been duly considered and adopted by Congress and the President.

The sole point of contention—and the sole issue in this appeal—is whether the Commonwealth of Massachusetts may impose its own international trade sanctions in order to alter the practices of a foreign government. Massachusetts, like more than twenty other state and local jurisdictions, has opted to implement an independent foreign policy by imposing sanctions (in the guise of selective purchasing) on trade with Burma. Moreover, the state's tool of choice—a secondary boycott—targets not merely the government of Burma, or even Burmese entities, but also any companies with business ties to Burma, and even companies that do no business with Burma at all (but whose corporate affiliates do).[5] These measures endeavor to leverage the state's economic weight into the far reaches of international commerce, and well beyond the scope of Petitioners' stated wish not to contract with dictators.

While the antipathy toward Burmese government practices underlying these sanctions is understandable, in *amici*'s view these laws do grave damage to the free flow of interstate and international commerce, to the federal government's ability to adopt and implement a unified foreign policy, and to the national political process for foreign policy formulation contemplated by the Constitution's framers. Massachusetts has overstepped its authority to legislate in its own citizens' public interest by legislating instead in a manner that affects (and even injures) the public interest of all U.S. citizens in international commerce and in a coherent national foreign policy.

[5] The workings of sections 22G through 22M of Chapter 7 of the Massachusetts General Laws (collectively, the "Massachusetts Burma Law") are described in Petitioners' Brief at 5-7.

The parties in this proceeding have addressed at length the legal issues raised by this appeal. *Amici* believe that the legal arguments invalidating state and local governments' appropriation of the federal authority over foreign commerce and foreign policy are clear and should be beyond question. In this brief, *amici* wish to focus particular attention on the business and economic implications of any contrary determination.

A. Scope of the Problem

This case is not just about the Commonwealth of Massachusetts's Burma Law. The stakes are much higher. Massachusetts is but one of more than twenty sub-federal jurisdictions around the country that as of this writing have already adopted Burma sanctions laws.[6] Others include New York City, Los Angeles, and San Francisco. Additional sub-federal jurisdictions are believed to be awaiting a final decision in this case before moving to adopt sanctions of their own.

Nor is this case solely about laws directed at Burma. In recent years states, counties, cities and other local governments

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[6] County of Alameda, Cal., Alameda County Admin. Code ch. 4.32 (1996; City of Berkeley, Cal., Resolution No. 57000881 (1995); City of Los Angeles, Cal., L.A. Admin. Code, art. 12, § 10.38 (1998); City of Oakland, Cal., Oakland Mun. Code, ch. 2.04 (1996); City of Palo Alto, Cal., Resolution No. 7715 (1997); City of San Francisco, Cal., San Francisco Admin. Code, ch. 12J (1995); City of Santa Cruz, Cal., Resolution No. NS-23,401, City Council Policy No. 29.13 (1997); City of Santa Monica, Cal., Resolution No. 8966 (1995); City of West Hollywood, Cal., Ordinance No. 97-505 (1997); City of Boulder, Co., Boulder Rev. Code § 2-8-11 (1996); City of Takoma Park, Md., Takoma Park Mun. Code ch. 3A (1996); Town of Brookline, Mass., 1997 Town Meeting art. 18 (1997); City of Cambridge, Mass., City Council Calendar No. 26 of June 10, 1996 (Burma); City of Newton, Mass., Ordinance No. V-146 (1997); City of Quincy, Mass., Quincy Mun. Code ch. 2.48.020 (1997); City of Somerville, Mass., Code of Ordinances § 2-386 (1998); Ann Arbor, Mich., Resolution No. R-178-4-96 (1996); City of New York, N.Y., N.Y. Gen. Mun. L. § 103 (1997); Town of Carrboro, N.C., Resolution No. 18/96-97 (1996); Town of Chapel Hill, N.C., Resolution No. 97-1-13/R-16 (1997); City of Portland, Or., Resolution No. 35710 (1998); City of Madison, Wis., Resolution No. 52,471 (1996).

across the country have also considered[7] and/or adopted[8] procurement restrictions and other trade sanctions targeting companies doing business with countries and territories as diverse as Switzerland, China, Saudi Arabia, Northern Ireland, Nigeria, Indonesia, Egypt, Pakistan, Turkey, Sudan, North Korea, Iraq, Morocco, Laos, and Vietnam.

Should this Court fail to affirm the judgment of the courts below, and hold that it is within the authority of sub-federal governments to impose sanctions intended to disrupt U.S. and foreign commerce in order to further their own foreign policy objectives, more such laws will surely follow. There are more than 39,000 sub-federal governments—39,000 states, counties, municipalities, townships, and towns—within the borders of the United States.[9] If the Massachusetts Burma Law is allowed to stand, there is no reason why thousands more might not soon stand beside it.[10]

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[7] *See* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html> (listing measures recently before state and local legislators).

[8] County of Alameda, Cal., Alameda County Admin. Code ch. 4.36 (1997) (Nigeria); City of Berkeley, Cal., Resolution Nos. 59000009, 59000107 (1997) (Tibet, Nigeria); City of Los Angeles, Cal., Resolution No. 60 (1998) (Switzerland); City of Oakland, Cal., Oakland Mun. Code, ch. 2.04 (1997) (Nigeria); Dade County, Fla., Resolution No. R-202-96 (1992) (Cuba); Town of Amherst, Mass., A.T.M. art. 43 (1997) (Nigeria); City of Cambridge, Mass., City Council Calendar No. 1 of May 19, 1997 (Nigeria), City Council Calendar No. 91 of July 27, 1998 (Indonesia); City of North Olmsted, Ohio, Resolution No. 97-9 (1998) ("sweatshops"); City of Philadelphia, Pa., Phil. Code § 17-104(b) (1995) (Northern Ireland). *See also* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html>

[9] Table 500: Number of Governmental Units, by Type (1997 data, excluding school and special districts), in *Statistical Abstract of the United States* (1999).

[10] State and local sanctions do appear to be proliferating at an increasing rate. While just three such measures were enacted in 1995, eight new laws made their way onto the books in 1996, and 1997 saw the

Moreover, there is no basis for believing that states and localities employing selective purchasing sanctions will confine themselves to targeting the particular abuses in Burma. Already cities have taken it upon themselves to determine, for example, whether Switzerland inadequately compensates Holocaust victims,[11] or whether foreign countries permit "sweatshop" labor practices[12]—and have enacted selective purchasing laws to penalize such foreign governments' shortcomings. *Any* international cause could, with the support of a vocal local constituency, become the impetus for state and local government exercises in foreign policy. One can easily envision selective sanctions targeting companies who do business with particular foreign countries

- whose forestry practices are unsustainable,
- that are not signatories to the U.N. Framework Convention on Climate Change,
- that permit or, alternatively, outlaw abortion,
- that do not conduct democratic elections, or
- that, like the United States, have not signed international conventions on land mines, nuclear test bans, or the proliferation of chemical and biological weapons.

Put simply, there is no logical limit to the range or number of international causes that may be deemed worthy of trade sanctions by a state or locality at any given point in time.[13]

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enactment of fourteen additional sub-federal sanctions. *See* notes 6 and 8 *supra*; *see also* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html>. Although this trend abated somewhat in 1998 and 1999, when seven and three new measures were approved, respectively, *see id.*, that shift may very well be attributable to the pendency of this litigation, as well as to the passage of federal sanctions legislation.

[11] *See* City of Los Angeles, Cal., Resolution No. 60 (1998).

[12] *See* City of North Olmsted, Ohio, Resolution No. 97-9 (1998).

[13] The extraterritorial effects of state and local sanctions are most obvious with respect to selective purchasing laws intended to implement

It is also critical to take into account the unique American context in which this question arises. The United States is especially vulnerable to a proliferation of local measures that are targeted at international issues. Our diverse population is drawn from almost as many nationalities and ethnicities as are found on the globe. Though the country as a whole may be a "melting pot," affinity and ethnic clustering remains common at the local level. Clustered local populations with common interests can readily "capture" the attention—and support—of local government. This is all well and good to the extent that the local government restricts its regulatory ambitions to addressing local needs and pursuing local objectives. It is likewise appropriate for local representatives to seek to influence matters of national policy by communicating local views to the appropriate branches of the federal government—where they may be balanced against one another to produce federal action in the *national* interest.

State and local economic sanctions, however, vault local interests directly onto the national stage, causing national consequences without taking national interests into account. If any locally powerful interest group can cause the local government to enact a selective purchasing law to implement a foreign policy agenda, then such laws will proliferate—and their nationwide negative effects will multiply exponentially.

More concretely, this unique American context gives rise to a serious risk of inconsistent local sanctions. One can readily foresee some localities enacting selective procurement laws penalizing one side in, for example, the Middle East or Kashmir controversies, at the same time that other jurisdictions were passing sanctions laws targeting the other

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foreign policy objectives. Efforts to use selective purchasing to dictate public policy beyond a locality's borders are similarly constitutionally infirm, however, when domestic causes are at issue. *See Air Transport Ass'n v. City and County of San Francisco*, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998) (holding unconstitutional local procurement ordinance that sought to regulate its contractors' employee benefits policies regarding same sex domestic partners throughout United States).

side. This Court, in striking down discriminatory state statutes, has explicitly recognized this danger of multiple, inconsistent state regulations.[14]

B. Impact on Companies

Consider the difficulties that just two state or local sanctions laws can create. In 1998, New Jersey proposed to enact prohibitions on procurement from Swiss companies and companies doing business with Switzerland, while Maryland contemplated selective purchasing sanctions against Nigeria.[15] Were those proposals to become law, a company doing business with Switzerland and Nigeria would not be able to do business with New Jersey and Maryland. A company doing business with Switzerland but not Nigeria could do business with Maryland but not New Jersey, and vice versa for a company doing business with Nigeria but not Switzerland. Conversely, a company doing business with New Jersey and Maryland could not do business with Switzerland or Nigeria, and so on.

These complexities mount with each additional state or local sanction heaping on more dizzying permutations, further segregating the U.S. and foreign markets, and adding greater compliance burdens.[16] As the Court recently observed: "Avoiding this sort of 'economic Balkanization,' and the retaliatory acts of other States [and foreign nations] that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence." *Camps Newfound/*

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[14] *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 584 (1986).

[15] *See* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html> (listing and describing measures recently before state and local legislators).

[16] "Compliance burdens, if disproportionately imposed on out-of-jurisdiction enterprises, may indeed be inconsonant with the Commerce Clause." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 313 (1994).

Owatonna v. Town of Harrison, 520 U.S. 564, 577 (1997) (citation omitted).

It would be a mistake to underestimate the magnitude of the economic impact that sanctions have on the international business community. These procurement restrictions directly affect billions of dollars a year in business with state and local governments around the country. They are far more than mere symbolic statements or rhetorical flourishes.

The size of the state and local government procurement market underscores the impact of the sanctions. By one estimate, procurement by the fifty states alone totals some $281 billion annually.[17] Other approximations confirm the scale of this market: Almost 40% of the fifty state governments' expenditures,[18] or roughly $335 billion in 1996,[19] went to capital outlays and non-wage payments for current operations—a large proportion of which can be assumed to have reached the private sector through government contracting. Similarly, local governments' capital outlays and non-wage current operations expenditures totaled $396 billion in that same year.[20]

State and local procurement combined, then, may run as high as *$732 billion* each year.[21] And even a single state's procurement budget is formidable: the Massachusetts Burma

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[17] *See* Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. Sch. J. Int'l. & Comp. L. 303, 307 (1999).

[18] *See* Henry S. Wulf, *State Government Finances, 1994* (Table C), in Council of State Governments, *The Book of the States* (1997).

[19] *See* Table 504: All Governments, Detailed Finances 1996, in *Statistical Abstract of the United States* (1999).

[20] *See* id.

[21] *See* id.

Law alone restricts bidding on some $2 billion in state government purchases of goods and services.[22]

On the other side of the equation is the world market, where nearly $6 trillion in trade and investment changes hands each year.[23] Those countries alone that have already been targeted by proposed or enacted sub-federal sanctions[24] do at least $785 billion annually in trade in goods and services.[25]

Because of the Massachusetts Burma Law and other similar measures, companies must choose between these two promising markets. They may operate freely in the world economy, or they may curtail those activities in order to remain eligible for state and local procurement opportunities in the United States. The discriminatory impact on foreign commerce is manifest.

The ramifications for international commerce—and the coercive force—of that choice are readily illustrated by the following hypothetical, but all too plausible, scenario: Imagine that California, with estimated annual state procurement spending in the tens of billions of dollars,[26]

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[22] *See* Joint Appendix at 225.

[23] *See* International Monetary Fund, *International Financial Statistics* 60-61 (July 1998) (1997 total world exports $5.592 trillion, imports $5.463 trillion); International Monetary Fund, *Balance of Payments Statistics Yearbook* 64 (1998) (1997 total world foreign direct investment abroad $419 billion).

[24] *See supra* notes 7 and 8 and accompanying text.

[25] *See Dun & Bradstreet Exporters Encyclopedia* (1998) §§ 2.33 (China), 2.47 (Egypt), 2.78 (Indonesia), 2.93 (Laos), 2.115 (Morocco), 2.117 (Burma), 2.126 (Nigeria), 2.130 (Pakistan), 2.147 (Saudi Arabia), 2.161 (Sudan), 2.165 (Switzerland), 2.175 (Turkey), 2.187 (Vietnam) (imports plus exports for 1995 or 1996).

[26] *See* U.S. Census Bureau, *State Government Finances: 1997*, available at <http://www.census.gov/ftp/pub/govs/state/97st[state postal abbreviation].txt>.

decides to express its opposition to China's Taiwan policies by precluding bidding by companies who (or whose corporate affiliates) participate in China's $290 billion[27] import/export market. Now imagine that the state of Washington reacts to Taiwanese assertions of independence by barring access to Washington's contracts market (roughly $1.3 billion)[28] to all companies with links to Taiwan's $114 billion[29] in international trade. Only two state laws can thus put some $415 billion of commerce into play, to directly contradictory ends, and likely in conflict with carefully calibrated federal foreign policy.

State and local sanctions laws carve up the U.S. and international markets. As the Commonwealth intended, the Massachusetts Burma Law forces companies to choose between doing business with Massachusetts or in Burma. In fact, it reaches even more broadly than that, barring procurement not only from companies that directly transact business with Burma, but also from companies who have *never* done business there—but whose corporate affiliates (however remote, and over which they may have no control) have some minimal economic tie to Burma.[30] The law thus

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California's non-wage expenditures for current operations totaled over $31 billion in 1997.

[27] *See* China: Key Indicators (Feb. 28, 1999) (imports plus exports for 1996), in Economist Intelligence Unit, *EIU Investing, Licensing & Trading*, available in LEXIS, ASIAPC Library, EIUILT File.

[28] Some $2 billion in Massachusetts state contracts were affected by the Burma Law. *See* Joint Appendix at 225. Washington's non-wage current operations expenditures are two-thirds as large as those of Massachusetts. U.S. Census Bureau, *State Government Finances: 1997*, available at <http://www.census.gov/ftp/pub/govs/state/97st [state postal abbreviation].txt>.

[29] *See* Taiwan: Key Indicators (Dec. 30, 1999) (imports plus exports for 1997) in Economist Intelligence Unit, *EIU Importing, Licensing & Trading*, available in LEXIS, ASIAPC Library, EIUILT File.

[30] That is, Massachusetts agencies may not procure goods or services from a U.S. company owned by a multinational parent company that has

presents some companies with no choice at all; their ability to do business with Massachusetts, or the penalty of forfeiting that business, is at the mercy of their corporate parents' and siblings' international business plans.

In this light, it is important to recall that Massachusetts's sanctions and others like them affect not only companies involved in traditional international trade in goods, but those providing services as well. The sweeping reach of these measures is illustrated by the example of financial services: Financial institutions supply a complex array of services, ranging from commercial banking to bond underwriting to pension fund management to insurance. These services are provided to the full range of state entities, that is, not only state agencies but also housing authorities, development corporations, transportation authorities, educational loan entities, etc. In light of the recent U.S. legislation removing statutory walls separating different types of financial institutions,[31] that array of services provided by affiliated companies will soon be even broader. Yet these same financial entities will find themselves on Massachusetts's restricted list for all of those services if any single one of their global affiliates or branches does business in Burma or provides any financial services—from accepting deposits, to providing advice, to acting as a mere escrow agent—to any Burmese government-affiliated entity. *See* Mass. Gen. L. Ann. §§ 22G-22H. Unraveling these global entanglements even to determine whether a financial institution is in compliance with the Massachusetts Burma Law is daunting enough; the havoc wrought by actually implementing a proliferation of sub-federal sanctions is almost unthinkable.

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other, unrelated subsidiaries that allow their goods to be marketed in Burma, directly or otherwise—even though the U.S. company may have no other connection to Burma, and no control over its foreign affiliate's business activities.

[31] *See* Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

Multiplying state and local sanctions regimes give rise to other very practical, if less quantifiable, problems. First, individual companies' competitiveness is harmed: At any moment—whenever yet another state or locality chooses to enact selective purchasing sanctions—*amici*'s members may be forced to make this difficult choice between pursuing international business activities and remaining eligible for U.S. state and local government procurement contracts. As a result, they risk becoming known as unreliable business partners in the eyes of foreign companies and foreign governments, and they suffer a corresponding competitive disadvantage when they attempt to do business abroad.

Second, for even the most sophisticated companies it is very difficult and costly even to track—much less to comply with—sanctions-related developments in all fifty states and the tens of thousands of cities and towns that might be persuaded to act in this arena. Far from being limited to the largest American localities, sub-federal sanctions ordinances have cropped up at all levels across the country. In this light, Petitioners' contention that one should look to Congress (rather than the Constitution) to invalidate sub-federal international trade sanctions rings hollow indeed. It is neither realistic, nor a reasonable extrapolation of the framers' intentions, to suggest that businesses should petition Congress for preemptive legislation each and every time Carrboro, North Carolina or North Olmstead, Ohio elects to impose trade sanctions with respect to a new country or a new international cause célèbre.

As the world's largest market, largest source of outbound investment, and largest haven for foreign investment, the United States has by far the most to gain from an open global economy. It also has the most to lose if the formulation and implementation of foreign and trade policy are hijacked or impaired by sub-federal entities. Likewise, it is U.S. companies—not foreign companies or foreign countries—that have the most to lose if state and local selective purchasing sanctions continue to proliferate. American companies are

among the most globally active, and the increase in U.S. exports has brought remarkable growth to the U.S. economy. The burden of complying with an ever more complex array of local sanctions will fall chiefly upon U.S. companies, who will also be the principal targets of any retaliatory action. Massachusetts and its fellow activist sub-federal jurisdictions thus impair the whole nation's economic affairs.

C. Effects on the Conduct of Foreign Affairs

The Commonwealth of Massachusetts would have this Court believe that the Massachusetts Burma Law merely implements a local purchasing preference, much like a procurement ordinance favoring the purchase of recycled products.[32] In truth, however, this procurement sanctions law is neither so mundane nor so benign. Massachusetts has enacted an economic sanction against a foreign government, has employed a secondary boycott against businesses worldwide, and is using its purchasing laws as a weapon to implement a foreign policy agenda.

It should be clear beyond doubt from a review of the record that both the intent and the effect of the Massachusetts law has been to influence business activities abroad (namely, in Burma) and, through such sanctions, to influence the conduct of the Burmese government. This purpose is reflected

- in the challenged statute itself, which imposes a secondary boycott on companies doing business with Burma without regard to where those companies are located, the level of their business activities in Burma, or the origin of the products to be sold to the state;

[32] At least thirty-eight of the fifty states' purchasing laws accord preferences to recycled products. *See* Table 7.11, State Purchasing: Buy-American Laws and Other Practices (1997 data), in Council of State Governments, *The Book of the States* (1998-99).

- in the statute's legislative history, which clearly evinces the sponsors' intention to pressure Burma to modify its domestic policies;[33] and
- in the broader campaign pursued by sanctions advocates, reflected in companion procurement laws adopted (at this writing) by more than twenty other state and local jurisdictions.[34]

Indeed, the purpose and intended effect of the Massachusetts Burma Law is not merely to burden and discriminate against foreign commerce with Burma, but to halt it entirely. And the means that Massachusetts has chosen to do so—a secondary boycott—is especially pernicious. The Commonwealth has not simply refused to "trade with dictators"[35] in the Burmese government, or to trade with Burmese companies, or to purchase Burmese goods (a primary boycott). It has set its sights on regulating a much broader international market: U.S. and other foreign companies that have any such business ties, however remote or indirect. Indeed, the Massachusetts law even reaches companies that have *never* done business with Burma (but who are related through corporate affiliations with *other* companies who have such ties). United States federal authorities wield the dangerous foreign policy weapon of a secondary boycott with great care, because it brings with it

[33] *See NFTC v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (discussing legislative history).

[34] *See* jurisdictions listed *supra* note 6. The nature and progress of this campaign have been carefully documented by, among others, the Investor Responsibility Research Center. *See, e.g.*, Investor Responsibility Research Center, *Country-Specific State and Local Selective Purchasing Laws* (1997); Investor Responsibility Research Center, *Multinational Businesses in Burma (Myanmar)* (quarterly report).

[35] Petitioners' Brief at 11.

considerable international turmoil.[36] Massachusetts, however, has deployed this most powerful of international economic sanctions—which the state itself gravely characterizes as a "wise alternative to war"[37]—on its own initiative, apparently heedless of the consequences to the nation as a whole.

Massachusetts enacted its selective purchasing law with a clear and avowed purpose: to punish a foreign government and pressure that foreign government to modify its domestic policies. *See NFTC v. Baker*, 26 F. Supp. 2d at 291 (discussing legislative history). While the Commonwealth's concern for the well-being of the people of Burma is laudable, it is not the state's prerogative to craft and implement its own foreign policy. The conduct of foreign affairs is a delicate responsibility requiring a weighing of *national* interests. That responsibility is committed by the Constitution to the President and Congress.

The Massachusetts Burma Law alone has seriously impaired federal foreign policy and the United States' dealings with foreign governments.[38] As noted, however, that law does not stand alone. It is but one out of some forty enacted or recently proposed state and local sanctions, and only a precursor of the many local foreign policy initiatives sure to follow should this Court not affirm the judgment of the courts below.

Proliferating sub-federal sanctions pose a direct threat to the federal government's ability to conduct foreign policy. This is not merely an academic threat; it is very much a practical one. The scope and magnitude of this danger were

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[36] United States foreign policy representatives must already cope with the international diplomatic fallout of considered *federal* decisions to impose economic sanctions, such as the Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (also known as the Helms-Burton Act).

[37] Petitioners' Brief at 29.

[38] *See* Brief of *Amicus Curiae* European Union.

recently outlined by one of the principal architects of the Clinton Administration's foreign economic policy, then-Assistant Secretary of State for Economic and Business Affairs Alan P. Larson,[39] in a speech before the Council of State Governments:

> I am not a lawyer, and I am not here to discuss the questions that have been raised as to the constitutionality of state and local sanctions measures. *I would, however, like to draw on my personal experience to discuss some of the very real ways in which state and local sanctions can disrupt the Executive Branch's conduct of foreign policy:* (1) such measures may clash with Presidential foreign policy initiatives, undermining the ability of the United States to speak with one voice on foreign policy matters; (2) they can complicate efforts to build coalitions with our allies; (3) they can raise allegations of violations of our international legal obligations; and (4) they can have very significant costs for states that are trying to attract investment.
>
> Policy toward Burma illustrates some of these points. Congress and the President carefully tailored the precise measures the federal government would impose in seeking to influence change in Burma. . . . These measures reflect a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there. . . . *The sanctions called for in the Massachusetts law are very different . . .*
>
> *The Massachusetts Burma law has, in my experience, complicated our ability to build*

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[39] Ambassador Larson currently serves as Under Secretary of State for Economic, Business, and Agricultural Affairs.

> *coalitions with our allies to affect the changes in policy that both we and the sponsors of the Massachusetts statute seek.* We depend on partners like the EU for cooperation in pressing other governments to change policies harmful to our common interests. . . . Although the U.S. continues to push for multilateral cooperation on Burma, the EU's opposition to the Massachusetts law has meant that US government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law . . . . *Based on this experience, it is my judgment that the law has hindered our ability to speak with one voice on the grave human rights situation in Burma, become a significant irritant in our relations with the EU and impeded our efforts to build a strong multilateral coalition on Burma where we, Massachusetts and the EU share a common goal.*[40]

As Ambassador Larson made clear, the proliferation of economic sanctions at the state and local level—however well-intentioned on the part of individual localities—has had significant and harmful consequences for our nation's foreign relations.

In this respect, measures like the Massachusetts Burma Law often do more harm than good to the very causes they hope to promote. By acting in a manner inconsistent with the measures adopted by Congress and the President, Massachusetts has unbalanced the carefully calibrated policy devised by the United States in response to Burma's abuses. It is notable, for example, that Massachusetts's sanction is triggered by the very type of business activity that is expressly

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[40] Assistant Secretary of State Alan P. Larson, *State and Local Sanctions*, Remarks to the Council of State Governments (Dec. 8, 1998) (emphases added), available at <http://ofii.com/resources/legis/remarks.html>.

permitted by the federal law directed at Burma.[41] And by antagonizing U.S. trading partners, the Commonwealth's action has made it more difficult for the United States to win their support and move toward an effective multilateral policy. Massachusetts's unilateral effort to increase pressure on Burma has had the practical effect of *reducing* the international pressure that can be brought to bear on that regime. If sporadic and uncoordinated state and local actions cause the United States to be viewed as unreliable and unpredictable in international affairs, its pleas for collective action—such as collective condemnation of human rights abuses in Burma—will fall on deaf ears.

This burden on the United States' ability to design and conduct a rational, calibrated foreign policy affects more than the niceties of diplomacy. It has very real effects on people and businesses. The people of Burma are worse off to the extent that U.S. policies seeking to aid them are undermined, and to the extent that they do not benefit from the liberalizing effects of trade and investment. The people of the United States are worse off to the extent that Massachusetts's sanctions make the country less attractive to investment by multinational companies. And people around the world are worse off to the extent that soured relations with U.S. trading partners reduce the prospects for market-opening agreements, and for coordinated international economic policies. Furthermore, each additional state and local sanctions law increases the risk of foreign retaliation not just against the offending locality—that is, for example, not just against

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[41] Federal law authorizes the President to prohibit "new investment" in Burma, but expressly excludes from the "investment" definition "entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 100 Stat. 3009-166 (1997), at § 570(f)(2). The Massachusetts Burma Law, in contrast, is triggered by the sweeping category of "doing business" in Burma.

Massachusetts businesses or Massachusetts products—but against "the Nation as a whole."[42]

Its good intentions notwithstanding, Massachusetts's pursuit of an independent foreign policy toward Burma has imposed a serious—and unconstitutional—burden on foreign commerce and U.S. foreign policy. The consequences of the Massachusetts Burma Law borders of the state that enacted it, and for that reason, cannot be allowed to stand consistent with our federal form of government.

CONCLUSION

For the foregoing reasons, *amici curiae* Chamber of Commerce of the United States, Organization For International Investment, National Association of Manufacturers, American Insurance Association, American Farm Bureau Federation, American Petroleum Institute, United States Council for International Business, and Chemical Manufacturers Association respectfully ask this Court to affirm the judgment of the court of appeals that the Massachusetts Burma Law is unconstitutional. The statute impermissibly disrupts and fragments interstate and foreign commerce, and is an illegitimate intrusion on Congress's and the President's exclusive authority over the foreign affairs of the United States.

Respectfully submitted,

Daniel M. Price
Counsel of Record
Marinn F. Carlson
POWELL, GOLDSTEIN, FRAZER & MURPHY LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
Tel: (202)347-0066

[42] *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1979). The Court has explicitly recognized this danger in its foreign commerce jurisprudence.

Of counsel:
Robin S. Conrad
National Chamber
Litigation Center, Inc.
1615 H Street NW
Washington, DC 20062
Tel: (202) 463-5337

Jan Amundson
Quentin Riegel
National Association of
Manufacturers
1331 Pennsylvania Ave. NW
Washington, D.C. 20004
Tel: (202) 637-3058

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In the
Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,
v.
NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Writ of *Certiorari* to the
United States Court of Appeals
for the First Circuit

BRIEF OF *AMICI CURIÆ* ASSOCIATED INDUSTRIES OF MASSACHUSETTS, CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION, AND THE RETAILERS ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF RESPONDENT AND FOR AFFIRMANCE

MICHAEL E. MALAMUT*
* *Counsel of Record*
LORETTA M. SMITH
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Telephone: (617) 695-3660
Facsimile: (617) 695-3656

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INTEREST OF *AMICI CURIÆ*[1]

Associated Industries of Massachusetts ("AIM") is a Massachusetts corporation with its principal place of business at 222 Berkeley Street, Boston, Massachusetts. AIM is a non-profit, business organization with approximately 5000 members, all of which do business in the Commonwealth of Massachusetts. The Retailers Association of Massachusetts ("RAM") is a Massachusetts corporation with its principal place of business at 18 Tremont Street, Boston, Massachusetts. RAM is a non-profit Massachusetts business association with approximately 1700 members, comprised of retail companies of all types and sizes which do business in the Commonwealth of Massachusetts. The Connecticut Business and Industry Association ("CBIA") is an association of Connecticut businesses with approximately 10,000 member companies throughout the state. CBIA offers its members a wide array of resources and services related to the legal, economic, and social aspects of running a business, and it presents the views of its members on public policy and legal issues to regulatory, legislative and judicial authorities. AIM and CBIA have frequently participated as *amicus curiæ* in cases raising issues of importance to the business community.

While AIM, RAM, and CBIA, like the Commonwealth of Massachusetts, are concerned about the human rights violations committed in Myanmar, they do not believe that each of the fifty states and the thousands of American cities and towns may, by boycotting companies that do business in countries they currently disfavor, engage in foreign policy initiatives to attempt to effect change in those countries.

Amici are particularly concerned because of the importance of exports to the economic health of New England and the prosperity of New England businesses. The Burma Law and others like it put New England businesses in the position of being unreliable suppliers in the highly competitive international marketplace. While today it is the governing regime in Myanmar that has piqued local anger, tomorrow it could be Canada, the Commonwealth's largest trading partner, in a dispute over international fishing rights. Such a dispute would have even more dire consequences for New England businesses.

Pursuant to Supreme Court Rule 37.2, counsel for *amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

SUMMARY OF ARGUMENT

The legislative history of the sanctions that the Commonwealth of Massachusetts imposed on companies doing business in Myanmar demonstrates beyond dispute that it was a foreign policy initiative to effect change in and restore democracy to Myanmar. The legislators who debated and passed the bill and the Governor who signed it all recognized it to be foreign policy.

The Burma Law serves no legitimate local purpose. The Commonwealth's argument that it does because it serves to disassociate the Commonwealth and its tax dollars from Myanmar should be rejected. The Commonwealth has no

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

association with Myanmar which must be severed to distance itself further from the denial of human rights by the governing regime there. The Burma Law, instead, disassociates the Commonwealth from companies that do any business in Myanmar for the sole purpose of fostering its foreign policy goals.

The attempt made by certain of the Commonwealth's *amici* to create another local interest also fails. Invalidating the Burma Law will not undermine state sovereignty or interfere with local control over the allocation of scarce resources.

Even if it serves a legitimate local interest, the Burma Law is nonetheless invalid because its has serious foreign resonances and has had a high degree of success in driving businesses out of the markets in Myanmar.

Assuming the market participant doctrine applies to foreign commerce, which it does not, the Burma Law is not the act of a market participant under that doctrine as developed by this Court. Prohibiting the Commonwealth's vendors, their subsidiaries and affiliated companies from selling their goods and services in Myanmar is market regulation not market participation. The fact that the Burma Law increases the cost of certain goods and services underscores the conclusion that it is not the act of a market participant.

ARGUMENT

Respondent National Foreign Trade Council ("NFTC") demonstrates in its Brief that the United States Court of Appeals for the First Circuit correctly ruled that the Massachusetts Burma Law, Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M, is unconstitutional because it impermissibly intrudes on the federal government's exclusive foreign affairs powers.

NFTC also demonstrates that the First Circuit correctly held that the Burma Law violates the Foreign Commerce Clause of the United States Constitution and is, in any event, preempted. *Amici* will not repeat those arguments here. *Amici* will address two issues: the lack of any legitimate local interest advanced by the Burma Law and the Commonwealth's contention that it acts as a "market participant" when it engages in foreign policy, thereby immunizing its conduct from scrutiny. *Amici* contend that the economic irrationality of the Massachusetts Burma Law, which *increases* the costs for goods and services purchased by the Commonwealth, demonstrates that the Commonwealth is not acting as a market participant but as a market regulator.

I. THE BURMA LAW, ENACTED TO CONDEMN THE GOVERNING REGIME IN MYANMAR AND TO HELP TO RESTORE DEMOCRACY THERE, IS A FOREIGN POLICY INITIATIVE WHICH HAS NO LEGITIMATE LOCAL PURPOSE.

The Legislative history of the Massachusetts Burma Law demonstrates beyond dispute that it is a foreign policy initiative of the Commonwealth with the "identifiable goal" to have "free democratic elections in Burma." National Foreign Trade Council v. Natsios, 183 F.3d 38, 46 (1st Cir. 1999). Representative Byron Rushing, the sponsor of the bill which became law, explained its purpose to his colleagues in the House:

> I want to . . . make . . . very clear what this legislation does. . . . [I]t establishes a program that is called selective purchase in regard to the country of Burma. It does that for a simple reason. We, in this legislature, have the proud

> reputation of being one of the leaders in this country and in this world . . . in the movement to restore democracy in South Africa, and we learned in that process two things. One is, that if you're going to engage in foreign policy, you have to be very specific.

Joint Appendix ("Jt. App.") at 38-39. Representative Teague who sought to expand the bill to include China candidly described precisely what the House thought it was doing:

> [F]rom time to time over the years [the] Massachusetts General Court . . . has decided to engage in their own little version of foreign policy by restricting investments, primarily from our state pension funds and prohibiting pensions [from being invested] in policies we find offensive.

Jt. App. at 35.

Members of the Senate also recognized that the bill was a foreign policy initiative. Senator Walsh, a supporter of the bill, noted that

> the Federal Government gets many of its best ideas from the Commonwealth of Massachusetts . . . so we look forward to future debate on how we can advance civil and human rights in the country of Burma by our business dealings with the Commonwealth of Massachusetts.

Jt. App. at 47. Other senators questioned why the legislature was attempting to engage in foreign policy.

> If it is such a great idea then maybe [Senator Walsh] could ask the president of the United States to put it in his foreign policy guidelines and business guidelines.

Jt. App. at 47. Senator Hicks also urged the Senate not to "dabble in foreign affairs." Jt. App. at 50.

In the news release announcing that then-Governor Weld had signed the legislation, he stated:

> One law passed by one state will not end the suffering and oppression of the people of Burma, but it is my hope that other states and the Congress will follow our example, and make a stand for the cause of freedom and democracy around the world.

Jt. App. at 57. Thus, all involved in the enactment of the Burma Law understood and acknowledged that they were setting foreign policy.

While the Commonwealth admits this, as it must, it also contends that the Burma Law was "intended to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma," Petitioners' Brief ("Pet. Br.") at 31, which the Commonwealth asserts is a "valid local purpose." Jt. App. at 32. The Commonwealth's *amici* repeat this theme. See Brief of the Council of State Governments et al. at 24 (selective purchasing laws have the "goal of refraining from supporting morally offensive practices"); Brief of New York City Comptroller et al. at 7 ("the state has an independent institutional interest, apart from the substance of its social goals, in spending public money in a way that reflects the views

of its citizens"). Upon the most cursory analysis, this purported local concern turns out to be simply rhetoric.

The Commonwealth has no relationship with Myanmar from which it must disassociate itself to protect the moral values of its citizens. Indeed, the Burma Law "disassociates" the Commonwealth not from Myanmar, with which it never "associated," but from sellers of paper clips, pencils, cement, steel, computers, and telephones that sell any of their products to buyers in Myanmar, or have a subsidiary or affiliated company that does business there. The Commonwealth disassociates from these sellers to effectuate its foreign policy goals, not to advance any legitimate local purpose.

The Commonwealth's *amici* seek to advance another purported local purpose when they argue that State sovereignty will be undermined and dire consequences will ensue if selective purchasing laws are not upheld. Relying on this Court's recent decision in Alden v. Maine, 119 S. Ct. 2240, 2264-65 (1999), they contend:

> Among the sovereign prerogatives reserved to the states and to the municipalities within their borders . . . is control over their own proprietary activities, including spending. . . . Without control over their own budget and business affairs, states and localities would lack autonomy and financial independence, and would ultimately lose control over "the course of their public policy and the administration of their public affairs."

Brief of the New York City Comptroller et al. at 8 (citations and footnote omitted). This hyperbole is misdirected and provides

no basis for sustaining the Burma Law.

Invalidating the Burma Law would not undermine a state's control over its budget which will continue to be set by the legislature. Nor would any state's financial independence be compromised -- states would remain free to allocate their tax dollars to procuring those goods and services they determined they needed. Unlike the immunity from suits for damages at issue in Alden, invalidating the Burma law does not in any way affect the "the allocation of scarce resources among competing needs and interests." Alden, 119 S. Ct. at 2264. States would retain their authority to prioritize their needs and decide how best to serve them. No federal intrusion into "the distinct responsibilities of the State," id. at 2265, would result from holding the Burma Law invalid.

Even if this Court concludes that the Burma Law promotes a legitimate local purpose, it is nonetheless invalid. While state laws furthering legitimate local interests which have "merely foreign resonances" may be upheld, Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 194 (1983), the effect of the Burma Law is more than a mere "resonance." The parties stipulated that the Commonwealth purchases some "$2 billion of supplies and services" each year which are covered by the Burma Law. Jt. App. at 225, ¶ 45. The parties also stipulated that "[f]oreign trade with the Union of Myanmar generates nearly $2.3 billion in revenues each year." Id., ¶ 46. Companies that do business with the Commonwealth had to choose between doing business with the Commonwealth and doing business in Myanmar. Natsios, 181 F.3d at 46. The Commonwealth's foreign policy has had its intended effect on companies doing business in Burma. Representative Rushing was quoted as saying, when he was informed that Apple Computer was discontinuing business in Myanmar: "This is

exactly what we want this law to do . . . . We hope the rest of the companies also get out." Frank Phillips, *Apple Cites Mass. Law in Burma Decision,* Boston Globe, Oct. 4, 1996, at B6, cited in D. Schmahmann & J. Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 Vanderbilt J. Transnational L. 175, 196 n.100 (1997). Not only did Apple Computer discontinue doing business in Myanmar, at least twelve other businesses did as well. Jt. App. at 101.

Casting the Burma Law as a means of disassociating itself and its tax dollars "from the denial of human rights in Burma," does not transform otherwise impermissible conduct into a legitimate local interest. If, as the First Circuit held and the NTFC demonstrates in its Brief, state and local governments have no role to play in the conduct of foreign affairs, statutes, ordinances and regulations — which have as their purpose "making a statement" about foreign affairs and foreign governments (or "disassociating" from them) — serve no legitimate local purpose, and have "great potential for disruption or embarrassment" of United States foreign policy. Zschernig v. Miller, 389 U.S. 429, 434-435 (1968).[2] These selective purchasing laws, including the Burma Law, cannot stand.

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2. See also Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill.2d 221, 104 Ill. Dec. 743, 503 N.E.2d 300, 307 (1986) ("Even though such disapproval may be justified, it nonetheless creates a risk of conflict between nations, and possible retaliatory measures. No single State should put the nation as a whole to such a risk.").

II. THE COMMONWEALTH'S FORAY INTO FOREIGN AFFAIRS IS NOT IMMUNIZED FROM SCRUTINY BY THE MARKET PARTICIPATION DOCTRINE.[3]

The Commonwealth contends that the Burma Law "is constitutional because it represents market participation, not regulation," and is therefore not subject to review under the foreign affairs or foreign commerce powers. Pet. Br. at 25. The Commonwealth reasons that its conduct is "market participation" because the Burma Law "governs only the procurement of goods and services by the State — and thus a market created solely by State purchasing." Pet. Br. at 31.[4]

This Court, however, has rejected the argument that all state procurement conditions are "market participation." Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 229 (1993). See also South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 95- 96 (1984) (plurality) ("[a]lthough the Court in Reeves did strongly endorse the right of a State to deal with whomever it chooses when it participates in the market, it did not — and did

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3. This argument assumes that the market participant doctrine applies to foreign commerce. The First Circuit correctly held, however, that it does not. Natsios, 181 F.3d at 59-60.

4. In making this "market creation" argument, the Commonwealth appears to be confusing its dollars with existing markets. The paper clip and computer terminal markets exist whether or not the Commonwealth makes purchases in them. Contrary to the Commonwealth's claim, it cannot be said that these markets were created "solely by State purchasing."

not purport to — sanction the imposition of any terms that the State might desire . . .); Reeves, Inc. v. Stake, 447 U.S. 429, 438 n. 12 (1980) (recognizing that "[w]hen a State buys or sells, it has the attributes of both a political entity and a private business"); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 211 n.7 (1983) (recognizing that there are limits to burdens state may impose on its spending decisions); Heim v. McCall, 239 U.S. 175, 192 (1915) (characterizing the imposition of conditions governing the hiring of workers for public construction projects as "regulation"). Accordingly, the question is whether the conditions on state procurement created by the Burma Law are market participation or market regulation.

The Commonwealth does not act as a market participant when it disqualifies companies from receiving state contracts because those companies do business in Myanmar. As this Court noted in Camps Newfound/Owatonna, Inc. v. Harrision, 520 U.S. 564, 592-93 (1997), the three early cases[5] in which the market participation doctrine was used to uphold state statutes that discriminated against out-of-state entities, "stand for the proposition that, for purposes of analysis under the dormant Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.'" See also College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219, 2230

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5. As recounted in NFTC's Brief, the first case in which the market participation doctrine emerged was Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976). The doctrine also justified the conduct at issue in Reeves and White. In each of these cases, state or local government acted to advance the local economic or environmental, not moral or political, interests of its citizens.

(1999) ("where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator"). The Burma Law, of course, does not favor Massachusetts citizens or companies[6] over others, and is, therefore, not protected from invalidity by the reasoning of the early cases applying the market participation doctrine.

In striking the condition that Alaska imposed on the sale of its timber, the plurality in South-Central Timber set forth other factors to be considered to determine whether a state acts as a market participant when it imposes conditions on those with whom it deals:

> In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.

467 U.S. at 96. The plurality continued:

> The limit of the market-participant doctrine

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6. The Burma Law may indeed hurt Massachusetts companies who might be expected to seek contracts with the Commonwealth more frequently than out-of-state or foreign companies.

> must be that it allows a State to impose burdens on commerce *within the market in which it is a participant*, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

Id. at 97-98 (emphasis added). Under this analysis, the Burma Law cannot be considered market participation.

The Burma Law places restrictions on the private action of companies in the conduct of their businesses in connection with other contracts to sell goods and services in which the Commonwealth plays no role whatsoever. "The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private relations. When exercised by government, such a power is the essence of regulation." White, 460 U.S. at 219 (Blackmun, J., dissenting) (emphasis in original; footnote omitted). Accord South-Central Timber, 467 U.S. at 95-96 (plurality). The Commonwealth dictates with whom its vendors may deal — "the essence of regulation." In addition, the Burma Law targets a market in which the Commonwealth does not participate — Myanmar — and seeks to drive private companies from those markets by requiring those with which it may contract to stop doing business there.

The Commonwealth contends that it is a market participant under this Court's analysis in White. The Commonwealth's reliance on White is, however, misplaced. Indeed, the Commonwealth turns the holding and reasoning of White on its head when it argues that:

> given that White accepted an upstream restriction on whom private contractors can hire . . . , a selective purchasing law could not possibly be invalid simply because it might affect secondary upstream markets. . . . Like the restriction in White, the Burma Law imposes a narrow condition precedent on companies who are competing for state contracts and thus "cover[s] a discrete, identifiable class of economic activity in which the State is a major participant."

Pet. Br. at 34. The restriction upheld in White, that contractors working on construction projects funded by the City of Boston hire at least 50% Boston residents, is not similar or parallel to the restriction imposed by the Burma Law. The condition imposed in White did not go beyond the actual transaction between the parties. The contractors in White were not required to hire at least 50% Boston residents on all their other construction projects undertaken within the city, the nation or the world, the corollary to the restriction imposed by the Burma Law, as the First Circuit recognized. Natsios, 183 F.3d at 63. Moreover, the restriction in White promoted a legitimate local interest of the City in seeking employment for its residents — what this Court characterized as "parochial favoritism." White, 460 U.S. at 213. No such legitimate local interest is advanced by the Burma Law.

While the White Court recognized that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," the Court did not need to define those limits because "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" Id. at 211 n.7. This connection was "'crucial' to the market participant analysis in White." South-Central Timber, 467 U.S. at 95. The Burma Law, in contrast, affects many parties who are not "working for" or with the Commonwealth. Instead, it disqualifies businesses from "working for" the Commonwealth and requires businesses that bid to "work for" it to curtail working in another market.

Moreover, the economic result of the Burma Law demonstrates that it is not an exercise of a market participant's legitimate discretion. The Commonwealth's *amici* Council of State Governments et al. candidly detail how the Burma Law actually harms the Commonwealth's treasury and Massachusetts citizens:

> If Massachusetts rejects a low bid from a company with Burmese connections due to Burma Law procurement restrictions, Massachusetts taxpayers suffer because they must pay more for the goods or services at issue; Massachusetts beneficiaries of public projects suffer because the projects are more likely to be eliminated or scaled down due to higher costs; and Massachusetts businesses suffer because they, like out-of-state businesses, must choose between doing business with Burma and doing business with the Commonwealth of

Massachusetts.

Brief of Council of State Governments et al. at 11. The net result of the Burma Law is to increase the costs of some goods and services the Commonwealth purchases, an increase the Commonwealth can be expected to pass on to its taxpayers in the form of tax increases.

"When the policy the law promotes is not efficient use of state funds," Gould, Inc. v. Wisconsin Department of Industry, Labor & Human Relations, 750 F.2d 608, 614 (7th Cir. 1984), aff'd sub. nom., Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986), the policy is not one of a market participant. "[B]y flatly prohibiting state purchases from repeat labor law violators [or from companies who transact business in Myanmar] Wisconsin 'simply is not functioning as a private purchaser of services, . . . for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 289 (1986). This Court should reach the same conclusion here based on the same conduct — disqualification from participating in the markets for the goods and services that the Commonwealth procures.

While the line between regulation and legitimate proprietary action may sometimes be difficult to discern, this Court has held that "policy setting" is a hallmark of regulation:

> When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as a regulator of

> private conduct, the State is more powerful than private parties. *These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.*

Building & Construction Trades Council, 507 U.S. at 229 (emphasis added). There can be no doubt that the Burma Law is an exercise of "policy setting." It implements the Commonwealth's claimed moral and political policy in favor of human rights and its policy of disassociating itself from human rights violations by regulating the conduct of its prospective business partners, "conduct unrelated to the [prospective business partner's] performance of contractual obligations to the State." Id. The Burma Law regulates a number of markets and the conduct of businesses with which it does not contract. It is not the act of a market participant.

The proliferation of selective purchasing laws by state and local governments heralded by the *amici* supporting the Commonwealth's position hurts American business. In Massachusetts alone, exports exceeded $17 billion dollars in 1997.[7] Selective purchasing laws seek to foreclose markets in which businesses would otherwise be able to compete and, hopefully, prosper. While today's focus is Myanmar, if these local foreign policy initiatives are upheld, the Massachusetts Legislature could target Canada tomorrow if adequately outraged. Such a law would curtail exports to the largest

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7. Statistics compiled by the Massachusetts Institute for Social and Economic Research at the University of Massachusetts at Amherst and cited in Alliance for Massachusetts, *Export Index* (Spring 1998) .

trading partner of Massachusetts companies.[8]

In addition, selective purchasing laws have added, and, if the Burma Law is sustained, will continue to add, layers of complexity to conducting business around the globe because companies will have to consider not only federal regulations and controls but myriad, and differing, state and local laws as well. See D. Schmahmann & J. Finch, *supra,* 30 Vanderbilt J. Transnational L. at 206-207. As a matter of economic policy, as well as Constitutional law, these state and local selective purchasing laws have no legitimate place.

CONCLUSION

For the foregoing reasons, and those set forth in the Brief of Appellee National Foreign Trade Council, this Court should affirm the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

MICHAEL E. MALAMUT*
**Counsel of Record*
LORETTA M. SMITH
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

Dated: February 14, 2000

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8. Statistics compiled by the Massachusetts Institute for Social and Economic Research at the University of Massachusetts at Amherst and cited in Alliance for Massachusetts, *Export Index* (Spring 1998).

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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, *et al.*

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES: AUSTRIA, BELGIUM, DENMARK, FINLAND, FRANCE, GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, NETHERLANDS, PORTUGAL, SPAIN, SWEDEN, AND THE UNITED KINGDOM AS AMICI CURIAE IN SUPPORT OF RESPONDENT

RICHARD L.A. WEINER
DAVID G. LEITCH*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

* Counsel of Record

Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

This brief is submitted on behalf of the European Communities and their 15 Member States: Austria,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.[2] These parties, collectively referred to here as the "EU" or "European Union," respectfully submit this brief as *amici curiae* in support of the decision below, affirming the District Court's order enjoining enforcement of and declaring unlawful the Act of June 25, 1996, chapter 130, § 1, 1996 Mass. Acts 210, *codified at* Mass. Gen. Laws, ch. 7, §§ 22G-22M ("Massachusetts Burma Law"). The *amici* filed briefs as *amici curiae* in both the District Court and the Court of Appeals.

The *amici* regularly engage bilaterally with the United States Government on sensitive and important matters of foreign affairs—including such matters as the appropriate response to the situation in Burma. As regular participants in such diplomatic endeavors, the EU is concerned that state and local laws such as the Massachusetts Burma Law interfere with the normal conduct of international relations and raise questions about the ability of the United States to honor its international commitments. The EU is also concerned that, if upheld, the Massachusetts Burma Law will lead to a proliferation of similar efforts. The effect would be to greatly increase the difficulty of the U.S. Government to speak consistently and with one voice on matters of foreign affairs, thus exacerbating EU-U.S. tensions and undermining the important efforts of two key players in the area of foreign policy.

The EU's opposition to the Massachusetts Burma Law, however, should not be taken to mean that the EU is indifferent to the situation in Burma or supports Burma's present leadership. The EU's policies towards

[2] The European Communities ("EC") enjoy legal personality both internally and internationally under applicable provisions of the EC Treaties.

Burma have been plainly set forth in Addendum 1 to the EU's First Circuit Brief.[3]

For the reasons explained below, the EU respectfully submits that the Massachusetts Burma Law is a misguided means of addressing the conditions and effecting needed change in Burma.

SUMMARY OF ARGUMENT

The purpose of this brief is not to expand on the U.S. constitutional arguments that have been articulated by the National Foreign Trade Council ("NFTC"). Rather, the European Union seeks to assist this Court in understanding the concrete and negative ramifications that the Massachusetts Burma Law is having on its dealings with the United States, in terms of both foreign policy and commercial relations.

As it did in the District Court and the First Circuit, the EU respectfully calls to the Court's attention the following points: (i) the Massachusetts Burma Law interferes with the normal conduct of EU-U.S. relations; (ii) the Massachusetts Burma Law has created a significant issue in EU-U.S. relations, including—but not limited to—raising questions about the ability of the United States to honor international commitments into which it has entered; and (iii) overturning the judgment enjoining the Massachusetts Burma Law risks a proliferation of similar non-federal sanctions laws, aggravating these effects.

[3] *See also* Council Common Position of October 11, 1999 concerning the extension of Common Position 635/96 on Burma/Myanmar, 1999 OJ (L267) 1; European Parliament Resolution on Burma of April 15, 1999, 1999 OJ (C 219) 405.

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW INTERFERES WITH THE NORMAL CONDUCT OF EU-U.S. RELATIONS

The European Union, as well as its Member States, has always conducted foreign relations with the Government of the United States.[4] The EU notes that the individual American states neither send ambassadors to nor receive ambassadors from any foreign country and do not make treaties or international trade agreements. As a matter of international comity, moreover, no national government can engage directly with an individual U.S. state in a matter of foreign affairs. To do so would create insurmountable obstacles to effective diplomacy by creating confusion about which entity speaks for and acts on behalf of American interests.

Foreign affairs are conducted among governments and international organizations with legal competence to take international action, such as the recognition of governments, the regulation of trade, or the provision of foreign assistance. Foreign policy is made by governments or international organizations with such authority, and effective foreign relations are undertaken only by governments and international organizations that can make and keep commitments in these areas. Accordingly, all foreign policy activities of the European Union and of its individual Member States have traditionally involved the Government of the United States and not the governments of the individual U.S. states.

The Massachusetts Burma Law constitutes a direct interference with the ability of the EU to cooperate and carry out foreign policy with the United States. Contrary to the centuries-old practice in the field of interna-

[4] The EU operates on the understanding that, in relations with foreign nations on matters of diplomacy, it is the Executive Branch—and not the U.S. Congress—that speaks for the United States and serves as the U.S. interlocutor.

tional relations, Massachusetts now purports to conduct foreign policy on a state level by seeking to force the EU to impose additional sanctions on Burma and EU companies to abandon activities in Burma.

In contrast to the methods adopted by the Massachusetts Burma Law—and which Massachusetts through that Law has attempted to impose on others—the EU had specifically chosen not to ban economic activity in Burma in favor of other policy measures toward Burma. The Massachusetts Burma Law is deliberately aimed at influencing the foreign policy choices of the European Union. It is aimed at sanctioning the activities of EU companies which are not only taking place in a third country but which are also lawful under EU laws.

Massachusetts officials have also sought to engage the EU in direct discussions of Burma policy. While the EU has been willing to explain its Burma policy in writing to a Massachusetts representative, *see* Letter dated March 30, 1998 from Ambassador Hugo Paemen to Representative Byron Rushing (Addendum 3 to the EU's First Circuit brief), it has engaged in direct discussions only with the participation of U.S. State Department officials, because it regards actions of this kind as an interference with normal diplomatic relations and channels. Under settled authority, the EU simply cannot deal with the Commonwealth of Massachusetts on matters of Burma policy.

Massachusetts' injection of its dissonant voice into the EU-U.S. dialogue calls into question the settled lines of authority in U.S. foreign policy. These established processes serve fundamental purposes and permit the United States to speak clearly and with one voice in its relations with other nations through its Executive Branch officials. From the perspective of the EU, the Massachusetts Burma Law weakens the ability of the U.S. Government to conduct foreign policy in this manner with respect to Burma. It has thus undermined the ability of the EU to make foreign policy with the United

States. While the U.S. Government has rejected the use of an extraterritorial secondary boycott, an individual U.S. state has acted to the contrary, imposing just such an economic boycott to the detriment of EU interests.[5] As a secondary boycott, targeted not at the regime in Burma but at nationals of third countries who may do business there, the Massachusetts Burma Law is particularly disruptive of policy cooperation among governments, because such boycotts injure the interests of the countries with which the United States might seek to coordinate policies. As we explain next, this indeed has been the effect of the Massachusetts Burma Law.

II. THE MASSACHUSETTS BURMA LAW HAS CREATED AN ISSUE OF SERIOUS CONCERN IN EU-U.S. RELATIONS

The adverse effect of Massachusetts' action on EU interests has become one of the leading issues in EU-U.S. discussions on Burma, focusing the governments on an area of conflict and away from opportunities to achieve shared foreign policy objectives in support of human rights and political reform in Burma. This legislation has strained the political and economic climate between the European Union and the United States.

As a result of the Massachusetts Burma Law, the EU has felt obliged to lodge formal protests with the Government of the United States. On January 22, 1997, the European Union delivered an official *Note Verbale* to the United States Department of State protesting the Massachusetts Burma Law (Addendum 4 to the EU's First Circuit brief). In addition to such formal actions, the Massachusetts Burma Law has been the topic of intensive discussions between the European Union and

[5] It is simply not correct, as suggested by Petitioners and supportive *amici*, that the Massachusetts sanctions go no further than those imposed at the national level.

the United States at the highest levels, including at the twice yearly EU-U.S. Summit.[6]

Furthermore, the EU, as well as Japan, has challenged the Massachusetts Burma Law before the World Trade Organization ("WTO"), because in its view the Law conflicts with international obligations entered into within the framework of the WTO.[7] Given that enforcement of the Massachusetts Burma Law has been enjoined, the European Union and Japan requested suspension of the WTO challenge to the Law on February 9, 1999. The EU made this request simply as a temporary and conditional measure, due to the fact that the law is without immediate effect. This suspension does not reflect a lessening of the EU's concern at the effects of the Law or its negative impact on EU-U.S. relations. As the EU has made plain to both the chairman of the WTO dispute settlement panel constituted to hear this challenge and to U.S. authorities, the EU will begin new WTO proceedings should the current injunction on enforcement of the Law be lifted or should the EU otherwise determine that the Law is having a negative effect in any manner on European companies.[8]

[6] *See* Senior Level Group Report to the EU-US Summit, Washington, at 3 (December 17, 1999) <http://www.eurunion.org/news/summit/Summit Annex/SLGRept.html>.

[7] The WTO violation alleged by the EU encompasses only one aspect of the harm caused by the Burma Law. Although well aware that it was therefore without a full remedy at the WTO, the EU pursued its WTO rights on this issue due to the legally binding effect that a WTO decision would have on the United States. In the context of this brief, the EU is referring to the WTO action only as further evidence that the Law has created tensions between the EU and the U.S. The EU respectfully submits that only the WTO is competent to rule on the question of whether or not a measure is compatible with WTO rules and that—absent a WTO ruling on the measure in question—this Court must set the question of WTO compatibility of a measure to one side.

[8] *See* Letter of Ambassador Roderick Abbott and Ambassador Nobutoshi Akao to Mr. Ole Lundby, Chairman, WTO Panel on

Finally, in addition to the adverse effects described above, the EU respectfully submits that—prior to being enjoined—the Massachusetts Burma Law had a direct and disruptive impact on the commercial interests of the European Union.[9] EU companies—including those with no commercial presence within the Commonwealth of Massachusetts—received unsolicited requests from the Commonwealth for detailed information on possible business activities in Burma. The information was used in drafting Massachusetts' restricted purchase list. That list required regular updating and thus repeated decisions about companies' business links with Burma. The EU understands that this list was used not only by the Commonwealth of Massachusetts, but also by other state and local governments and private parties that may have wished to target companies with activities in Burma, since it was readily available on the Internet. The European Union remains concerned at the chilling effect these activities inevitably had and continue to have on EU companies doing business in the United States.

"United States—Measure Affecting Government Procurement," February 9, 1999 (Addendum 5 to the EU's First Circuit brief); Letter of Ambassador Roderick Abbott to Ambassador Rita Hayes, February 9, 1999 (Addendum 6 to the EU's First Circuit brief). In accordance with Article 12.12 of the WTO Dispute Settlement Understanding, the EU's 1998 WTO case lapsed on February 10, 2000, but this fact does not alter the views of the EU as regards pursuing its rights before the WTO.

[9] EU-U.S. commerce is substantial, amounting to approximately $372 billion in direct investment by EU companies in the United States and approximately $8 billion in direct investment by EU companies in the Commonwealth of Massachusetts. By best estimate, the restricted purchasing list includes 53 foreign companies with subsidiaries, affiliates, or branches in Massachusetts and 228 foreign companies not established in Massachusetts. *See* Addendum 7 to the EU's First Circuit brief.

III. FAILURE TO AFFIRM THE INJUNCTION AGAINST THE MASSACHUSETTS BURMA LAW RISKS A PROLIFERATION OF SIMILAR SANCTIONS LAWS

The EU respectfully expresses its concern that failure to enjoin the Massachusetts Burma Law will lead to the proliferation of other U.S. state and local sanctions laws. Former Governor William Weld, on signing the Massachusetts Burma Law, specifically expressed the hope that other U.S. states would follow Massachusetts' example. At present there are 22 U.S. local jurisdictions, including New York City, Los Angeles, and San Francisco, that have passed laws effectively prohibiting their public agencies from contracting with companies that do business in Burma. An additional eleven U.S. states and municipalities have considered or are now considering such proscriptions.[10]

As the *amicus* briefs filed in support of the Massachusetts Law make clear, state and local sanctions laws are not limited to Burma. Instead, a wide variety of similar laws are already in existence or contemplated. *See*, *e.g.*, Brief of the Comptroller of the City of New York, *et al.*, as *Amici Curiae* in Support of Petitioners at 2-4; Brief of *Amici Curiae* States of Arkansas, *et al.* in Support of Petitioner at 1-2 & nn. 1-3. At least eleven U.S. states and municipalities have enacted measures purporting to regulate business activities in Nigeria, Tibet, Indonesia, Switzerland, Northern Ireland, or Cuba, and at least 18 state and local governments have considered or are considering similar measures restricting business ties to Egypt, Saudi Arabia, Sudan, Pakistan, Turkey, Iran, North Korea, Iraq, Morocco, Laos, Vietnam, or China.

Thus, while—as discussed above—the Massachusetts Burma Law standing alone certainly presents difficulties

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[10] The fact that nearly forty state and local entities have filed *amicus* briefs urging reversal of the First Circuit only underscores the threat of even greater proliferation of sub-federal sanctions.

in the conduct of EU-U.S. relations, the EU's concern is much broader than simply the disruption caused by this particular law. State and local sanctions, and any proliferation thereof, greatly increase the difficulty of the U.S. Government to speak consistently and with one voice on matters of foreign affairs, thus exacerbating tensions in EU-U.S. relations.

The United States and the European Union have expended considerable effort seeking to resolve their differences over U.S. extraterritorial economic sanctions. This effort has not yielded progress on the issue of extraterritorial sanctions imposed by state and local governments, a shortcoming that is of considerable concern to the EU. In recognition of this danger of proliferation of sanctions measures, the EU and the U.S. agreed at the EU-U.S. Summit on May 18, 1998 on a set of principles covering the future use of sanctions in the context of the Transatlantic Partnership on Political Cooperation.[11] This included agreeing that the EU and the U.S. "will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators" and that such sanctions will be targeted "directly and specifically against those responsible for the problem." Crucially, it was also agreed that it is in the interests of both the EU and the U.S. "that the policies of governmental bodies at other levels should be consonant with these principles and avoid sending conflicting messages to countries engaged in unacceptable behavior." The EU believes that the enactment of more state or local sanctions laws will contradict the above-mentioned engagements and would thus undermine these important efforts of the European

[11] Transatlantic Partnership on Political Cooperation, at 2 (May 18, 1998) <http//www.europa.eu.int/comm/dg01/0518tppc.htm>.

Union and the United States in the area of foreign policy.

CONCLUSION

For the foregoing reasons, the European Union respectfully submits that the judgment of the First Circuit should be affirmed.

Respectfully submitted,

RICHARD L.A. WEINER
DAVID G. LEITCH*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600
Counsel for Amici Curiae

* Counsel of Record

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT AND FOR AFFIRMANCE

(Names of Members of Congress Listed on Inside Cover)

Of Counsel:

Eric D. Brown
COVINGTON & BURLING
Washington, D.C.

W. Thomas McCraney, III
WATKINS & EAGER, PLLC
Jackson, Mississippi

John Vanderstar
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
(202) 662-5540

Charles Clark
WATKINS & EAGER, PLLC
Post Office Box 650
400 East Capitol Street
Jackson, Mississippi 39205
(601) 948-6470

Counsel for Amici Curiae

February 14, 2000

BEST AVAILABLE COPY

DOUGLAS BEREUTER, SAM BROWNBACK,
RANDY "DUKE" CUNNINGHAM, CAL DOOLEY,
DAVID DREIER, THOMAS EWING, DIANNE FEINSTEIN,
PORTER GOSS, ROD GRAMS, AMORY HOUGHTON, JR.,
JIM KOLBE, STEVEN T. KUYKENDALL,
RICHARD G. LUGAR, DONALD MANZULLO,
GARY G. MILLER, GEORGE R. NETHERCUTT, JR.,
DOUGLAS A. OSE, MICHAEL G. OXLEY,
PAT ROBERTS, CRAIG THOMAS

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28 Weekly Comp. Pres. Doc. 1297 (July 21, 1992) 12

32 Weekly Comp. Pres. Doc. 1957 (Oct. 3, 1996) 16

The position of these amici is that the Constitution precludes States and localities from enacting enforceable legislation that attempts to coerce a foreign government to reform itself, whether or not the National government has taken specific action on the same subject.

For three reasons the Court should declare a "per se" rule invalidating direct involvement by State and local governments in making foreign policy through imposing such sanctions. First, in light of the longstanding and well-established principle that the Constitution gave the National government the sole power to act for the United States on foreign-policy matters, such a rule would preserve the ability of the National government to decide in a given case that taking no action, or limited action, may be the best foreign-policy response, whereas a conventional preemption analysis under Article VI of the Constitution – identifying a federal statute or some other specific action by the National government and attempting to determine if it was intended to "occupy the field" or if the State or local action under challenge is inconsistent with it – would not accomplish this salutary purpose. Second, a per se rule would minimize controversy by giving clear notice to States and localities, and to federal judges in the event of litigation, that this kind of State and local legislation is impermissible. Third, it would reduce the pressure on the Congress to keep abreast of every State and local action in the foreign-policy area and to act to override each such action believed to be contrary to the national interest.

INTEREST OF THESE AMICI[1]

These amici are among those who find the current regime in the Union of Myanmar abhorrent and deserving our full condemnation. They share with their sisters and brothers who

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[1] The parties have consented to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Rule 37.6 of the Rules of this Court, these amici state that no counsel for a party authored this brief in whole or in part and that no person or entity other than these amici and their counsel made any monetary contribution to the preparation or submission of this brief.

support Petitioners the view that strong measures are needed to bring about change for the better within Myanmar (which we will hereafter refer to as "Burma" for convenience). Where they differ is in believing that under our Constitution the Nation should speak with "one voice" on foreign-policy matters and that that one voice belongs to the one National government, not to fifty State governments let alone thousands of municipal governments. These amici also believe that the political branches of the National government, in addressing specific foreign-policy matters, must have at their disposal the entire range of possible actions – from engaging in "quiet diplomacy" by taking no action to imposing comprehensive sanctions, or even declaring war – and that no State or local government is entitled to select a different strategy (or even the same strategy by enacting its own measures) to address a particular foreign-policy matter. To allow such diverse approaches would hold a serious potential for embarrassing or even disrupting the efforts of the National government and for provoking adverse reactions by foreign governments that could affect the entire Nation.

These amici also believe that the Court should not impose upon the Congress the burden of keeping track of foreign-policy measures adopted by States and localities and of acting to "preempt" such activities by legislation specifically directed toward that end. Such a rule could mean that the Congress might have to enact legislation that targets a single State, or even a single city, and that declares that the State or city is being "too tough" on some foreign dictator or regime. This would place an intolerable burden on the Members of Congress.[2]

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[2] These amici do not address the issues of whether the Foreign Commerce Clause invalidates the Massachusetts Burma Law or whether the Tenth Amendment or the "market participation" doctrine have any bearing on this case.

SUMMARY OF ARGUMENT

When Massachusetts enacted its 1996 procurement statute[3] (the "Massachusetts Burma Law"), which burdens companies that do business in Burma, it trespassed into a realm of exclusively federal authority. Passing this law was an unabashed exercise in foreign-policy making, a power which the Federalist Papers and the decisions of this Court clearly indicate is vested exclusively in the political branches of the National government by the Constitution.

Since the time the current regime took control in Burma in 1988, the Congress and the Executive Branch have weighed the various foreign-policy options before them and selected a carefully crafted, incremental approach to putting pressure on the Burmese government. In formulating the appropriate response to the problems in Burma, an important concern to the National government has been garnering multilateral support for actions before taking measures like imposing sanctions that may not only be ineffective without broad support but which may anger our trading partners if the sanctions lack the potential for such support. Neither before nor after passage of the Massachusetts Burma Law have the National political branches implemented sanctions as far reaching as the procurement ban contemplated by the Massachusetts law.

While the conflict between the Massachusetts approach and the National approach highlights the problems posed when States and localities engage in foreign-policy making, in deciding the case now before it this Court need not determine the contours of this Nation's foreign policy vis-à-vis Burma and then hold the resulting image up against the Massachusetts law, attempting to see where the State law differs from or interferes with the National policy. Instead, this Court can simply choose to declare the type of foreign-policy making in which Massachusetts has engaged, the application of sanctions against foreign governments, to be a per se violation of the Constitution as an infringement of the exclusively

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[3] Act of June 25, 1996, Chapter 130, § 1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch. 7 §§ 22G-22M.

federal power over foreign affairs. Such a per se rule would protect the prerogative of the Congress and the Executive Branch to select a specific course of action in response to a given foreign-policy issue, even if that course is non-action. Furthermore, resorting to a preemption analysis in this context would unnecessarily require judges in future cases to make difficult and fact-intensive judgments about foreign policy as well as the intent and content of National, State, and local laws.

As one of the actors imbued with the power to craft this Nation's foreign policy, the Congress should not be required to expressly preempt sanctions imposed by States and localities. Whether or not the Congress acts in response to a particular foreign-policy issue and whether or not in so doing it adopts express preemption legislation, such intrusions by States and localities are forbidden by the Constitution. An express preemption requirement would not only place an intolerable burden on the Congress to monitor and respond to actions taken by thousands of State and municipal actors, but would also prove politically improvident. By declaring a per se rule invalidating the Massachusetts Burma Law, this Court would be respecting the structure and original intent of the Constitution and would announce a rule of law that would establish a clear line for political actors as well as judges to follow.

ARGUMENT

It is important to be clear about exactly what kind of State or local legislation is at issue here. (1) It is enforceable, and thus it does not include resolutions that simply express a legislature's opinion about a subject. (2) It imposes significant disadvantages on a particular foreign country, either directly or by prohibiting firms or individuals from doing business in or with that country, or burdening them if they do so.[4] Such legislation is foreign-policy

[4] Selective investment measures by which a State decides not to invest State pension plan monies or the like in funds or entities engaged in certain types of business or involved in a particular country are not at issue in this case. *See Board of Trustees of the Employees' Retirement* (...continued)

legislation, *i.e.*, it seeks to change the government or the policies of the government of a foreign country by depriving that country of economic opportunities. We refer to this type of legislation as "sanctions" legislation.[5]

The Massachusetts Burma Law is just such legislation. It severely restricts companies that do business in Burma from selling goods or services to the State. If a company wishes to do business with Massachusetts and is not within one of the exceptions in the State law, the company must forego doing business in Burma – as several companies have in fact done

System of Baltimore v. Mayor of Baltimore City, 562 A.2d 720 (Md. 1989). The case now before the Court involves procurement, not investment. In *Wisconsin Dept of Indus., Labor and Human Relations v. Gould,* 475 U.S. 282 (1986), this Court held that, while private purchasers may boycott certain providers because of activities they find objectionable, States are not necessarily entitled to do so.

[5] This definition does not involve an inquiry into subjective intent. It need not rest, for example, on examination of legislative purpose not expressed on the face of a bill. In the case of the Massachusetts Burma Law, aside from the glaring indications from its sponsors and supporters that it was intended as a foreign-policy measure, the very character and structure of the law indicate that it is such. The Massachusetts law severely limits the ability of entities that conduct business in Burma to serve as contractors for the State. Similar contractor disqualification provisions have been employed by the National government as foreign-policy measures in various sanctions programs. *See, e.g.*, Iran and Libya Sanctions Act of 1996, 50 U.S.C.A. § 1701 note (1999) (disqualifying contractors that invest in the petroleum sector in Iran or Libya or provide certain items to these countries); 22 U.S.C. § 2797b (1994) (disqualifying contractors that contribute to missile proliferation); 50 U.S.C. App. § 2410c (1994) and 22 U.S.C. § 2798 (1994) (disqualifying contractors that contribute to chemical or biological weapons proliferation); 22 U.S.C.A. § 6301 note (1999) (disqualifying contractors that contribute to nuclear weapons proliferation); Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, 106 Stat. 2571, amended by Pub. L. No. 104-106, 110 Stat. 494, 50 U.S.C.A. § 1701 note (1999) (disqualifying contractors that contribute to weapons proliferation or development in Iran or Iraq); Exec. Order No. 13094, 63 Fed. Reg. 40803 (1998) (disqualifying contractors that contribute to the proliferation of weapons of mass destruction).

specifically in response to the Massachusetts law. This law is intended to force the Burmese regime to modify its behavior in response to such withdrawals. It has nothing to do with making more efficient use of the State's funds or any other manifestation of the police power traditionally enjoyed by the States. Instead, it is an exercise in foreign policy, pure and simple.[6]

These amici urge the Court to declare this kind of State or local legislation per se unconstitutional on the ground that formulating and implementing the foreign policy of the United States is an exclusive power of the political branches of the National government, regardless of if or how that power has been exercised.

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[6] Then-Governor William Weld, who signed the procurement bill into law, reportedly characterized the measures contained in the Burma law as "Massachusetts foreign policy. . . ." Frank Phillips, *State, U.S. Officials Discuss Burma Sanctions Bill*, Boston Globe (Apr. 16, 1997), at E6. The sponsor of the bill, State Representative Byron Rushing, introduced the bill to fellow Massachusetts legislators with the following comment: "The Commonwealth has a history of assisting fledgling, democratic movements throughout the world. Burma calls on our support now. . . . Continued pressure from Massachusetts is necessary to vigorously combat well-documented repression and intolerance in Burma." Letter from Rep. Byron Rushing to Rep. Christopher Hodgkins and Senator Warren Tolman, Comm. on State Admin. (Feb. 28, 1995) (quoted in Daniel M. Price and John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 Harv. Int'l. L. J. 443, 462 (1998)). As Governor Weld was preparing to sign the bill into law, Representative Rushing announced that the signature would "'[bring] state government into the international movement to support democracy in Burma.'" Frank Phillips, *Weld Expected to Sign Bill to Avoid Firms with Burma Ties*, Boston Globe (June 21, 1996), at 30. When Apple Computers pulled out of Burma and cited the Massachusetts law as the reason, Governor Weld highlighted the statute's intent to change behavior outside of the State by noting: "'that's exactly what it's meant to do.'" Frank Phillips, *Apple Cites Mass. Law in Burma Decision*, Boston Globe (Oct. 4, 1996), at B6.

I. THE CONSTITUTION GIVES THE NATIONAL GOVERNMENT EXCLUSIVE AUTHORITY TO SET AND CONDUCT FOREIGN POLICY.

Petitioners and the congressional amici who have filed in their support assert that the National government's exclusive authority over the foreign relations of the United States is limited to those specific foreign-relations topics identified in the Constitution. We disagree, and we adopt the argument of Respondent on this point. Excerpts from the Federalist Papers, various decisions of this Court and other sources emphasize the longstanding nature of the principle that federal exclusivity in the field of foreign affairs is not limited as Petitioners assert.

The Framers of the Constitution clearly indicated that the National government was intended to have exclusive power over foreign affairs, broadly defined. James Madison encapsulated this viewpoint in declaring, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." Federalist No. 42. Indeed, one of the driving forces behind the Constitution was the desire to remedy the infirmities of the Articles of Confederation, among which was "the power of any indiscreet member to embroil the Confederacy with foreign nations." *Id.* By centralizing the power to conduct all foreign policy in the National government, the Constitution was designed to protect the Nation as a whole against this danger posed by the conduct of foreign policy by individual States. As Alexander Hamilton explained, "the peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." Federalist No. 80 (explaining the reason for federal jurisdiction over certain judicial matters).

This Court has emphatically supported and echoed the words of the Framers. "[I]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation. . . ." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840) (plurality).[7] In its decisions, this Court has

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[7] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (noting that the Constitution expresses "concern for uniformity in (...continued)

consistently declared that the Constitution indeed achieved this goal: "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889). This Court has repeatedly expressed what amounts to a zero-tolerance for intrusion by the States into this exclusively federal realm:

> "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1943).
>
> "Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government." *United States v. Belmont*, 301 U.S. 324, 330 (1937).
>
> "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the [s]tate. . .does not exist." *Id.* at 331.
>
> The Constitution forbids "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).
>
> "[F]oreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government. . . ." *Id.* at 436.

The structure of the Constitution, the expressed original intent of the Framers, and the decisions of this Court relating to the federal exclusivity of the foreign-affairs power understandably led a prominent foreign-affairs scholar to conclude:

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this country's dealings with foreign nations and indicat[es] a desire to give matters of international significance to the jurisdiction of federal institutions").

> "Foreign relations are national relations. The language, the spirit and the history of the Constitution deny the States authority to participate in foreign affairs, and its construction by the courts has steadily reduced the ways in which the States can affect American foreign relations." Louis Henkin, *Foreign Affairs and the Constitution* 228 (1972).

After surveying the law, the drafters of the Restatement reached this same conclusion in declaring that "under the Constitution of the United States foreign relations are the exclusive responsibility of the Federal Government." Restatement (Third) of Law of Foreign Relations §201(g) (1986) (citation omitted).

II. THE COURT SHOULD PROTECT THIS EXCLUSIVE AUTHORITY BY HOLDING ALL STATE AND LOCAL SANCTIONS UNCONSTITUTIONAL, WHETHER OR NOT FEDERAL SANCTIONS EXIST.

The per se rule advocated by these amici would not only carry out the original intent of the Framers but would establish a clear rule for lower courts to apply. Such a rule is superior to application of a conventional preemption analysis in deciding the constitutionality of State and local sanctions legislation or other such efforts to carry out foreign policy for two reasons. First, a per se rule would protect the National government's authority to decide from a complex array of options precisely what action, *or non-action*,[8] is the appropriate foreign-policy response in a given situation. Second, a per se rule would reduce the need for federal judges to discern the contours of foreign policy, a task they are ill-suited to discharge.

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[8] *See* Harold Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 Vand. J. Transnat'l L. 133, 169 (1971) (non-action or official silence may "serve international commercial or political interests related to the desirability of continuing communication between . . . . countries").

A. The History of Steps Taken By the National Government With Regard To the Problems in Burma Illustrates the Wide Variety of Foreign-Policy Responses That Can Be Employed To Address a Specific Foreign-Policy Issue.

The facts regarding U.S. policy toward Burma illustrate that applying a per se rule rather than a conventional preemption analysis would protect the prerogative of the National government to decide when and to what extent to employ a specific foreign-policy response: silence or non-action, graduated actions, coordination with allies, and the like.

In September of 1988 the Burmese army staged a coup and took control of the government. They created a council – the State Law and Order Restoration Council ("SLORC") – to govern the country. Severe repression of the people of Burma followed. Thousands of people were arrested for attending demonstrations protesting the oppressive policies of the SLORC. In June of 1989 the SLORC arrested Aung San Suu Kyi, a young woman who had become a leader in the protest movement. Two years later she would win the Nobel Peace Prize, but she could not accept it in person because she was confined to her home, which was surrounded by barbed wire and troops.

The United States began pressing the SLORC to mend its ways almost immediately after it was created. Beginning in 1988, the United States has maintained an embargo on the export of arms to Burma. *See, e.g.*, *U.S. Policy Toward Burma*, U.S. Dept. of State, Bureau for East Asian and Pacific Affairs Press Release *in* U.S. Dept. of State Dispatch (Apr. 13, 1992). The following February President Bush determined that Burma, by virtue of its lack of cooperation and ineffective action in regard to narcotics control, did not meet the standards for certification of major narcotics source and transit countries under certain legislative initiatives;[9]

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[9] *See* Exec. Order No. 89-11, Certifications for Narcotics Source and Transit Countries, 54 Fed. Reg. 9413 (Feb. 28, 1989). In making this determination, the President acted under the authority granted to him by the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (...continued)

this resulted in denial of bilateral assistance and opposition to multilateral development assistance to Burma.[10] Later that year the Congress called upon all nations to withhold foreign assistance from Burma. *See* S. Con. Res. 61, 101st Cong. (1989).

Federal trade sanctions on Burma began to be considered in 1989 and 1990 with the introduction of legislation prohibiting the importation of Burmese products such as teak and fish, *see* H.R. 2578, 101st Cong. (1989); S. 822, 101st Cong (1990), but these measures were not enacted. In April 1989, President Bush took action in the trade realm by suspending Burma's benefits under the Generalized System of Preferences because of the SLORC's failure to recognize international standards for workers' rights. Memorandum on Amendments to the Generalized System of Preferences, 25 Weekly Comp. Pres. Doc. 547 (Apr. 13, 1989).

The following year the Congress gave its initial approval to the concept of sanctions directed at Burma – long before Massachusetts did. It authorized imposition of sanctions if the President made certain specific determinations. It also, however, directed the President to "confer with other industrialized democracies in order to reach cooperative agreements to impose sanctions against Burma." Customs and Trade Act of 1990, Pub. L. No. 101-382 § 138 (codified as amended in scattered sections of 19 U.S.C.).

(codified as amended at 22 U.S.C. §2291(h)(2)(A)(i)) (repealed by Pub. L. 102-583 § 6(b)(2), 106 Stat. 4392 (1992)). President Bush made this same determination in regard to Burma in 1990, 1991, and 1992. *See* Pres. Determ. No. 90-12, 55 Fed. Reg. 10597 (Feb. 28, 1990); Pres. Determ. No. 91-22, 56 Fed. Reg. 10773 (Mar. 1, 1991); Pres. Determ. No. 92-18, 57 Fed. Reg. 8571 (Feb. 28, 1992). President Clinton continued Burma's non-certification under his Administration. *See* Pres. Determ. No. 93-18, 58 Fed. Reg. 19033, (Mar. 31, 1993); Pres. Determ. No. 94-22, 59 Fed. Reg. 17231 (Apr. 1, 1994); Pres. Determ. No. 95-15, 60 Fed. Reg. 12859 (Feb. 28, 1995); Pres. Determ. No. 96-13, 61 Fed. Reg. 9891 (Mar. 1, 1996).

[10] *See* 22 U.S.C. §2291(h)(2)(A)(i)).

Since 1990, the Congress and the President have been addressing the refugee problems caused by the oppressive policies of the SLORC.[11] And the awarding of the 1991 Nobel Peace Prize to Aung San Suu Kyi and her continued detention provided additional occasions for the Congress and the President to put pressure on the SLORC regime.[12]

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[11] *See, e.g.*, Foreign Relations Authorization Act for 1990 and 1991, Pub. L. No. 101-246, §§ 702-703 (codified at 22 U.S.C. § 2651 note (1994)) (providing for humanitarian assistance to displaced Burmese and requiring reports from the Executive regarding U.S. immigration and refugee policies toward those who have fled Burma); Dire Emergency Supplemental Appropriations Act of 1990, Pub. L. No. 101-302, 104 Stat. 213 (1990) (providing for assistance to displaced Burmese). In July 1991, President Bush designated refugees from Burma as qualifying for assistance under the Migration and Refugee Assistance Act of 1962, 22 U.S.C. § 2601(b)(2) (1994), because he determined that "such assistance will contribute to the foreign policy interests of the United States." Memorandum on Assistance for Refugees from Tibet and Burma, 27 Weekly Comp. Pres. Doc. 510 (Apr. 25, 1991); *see also* Memorandum Authorizing Assistance to Cambodia and Burma, 28 Weekly Comp. Pres. Doc. 516 (Mar. 20, 1992); Memorandum on Refugee Assistance to Burma, 28 Weekly Comp. Pres. Doc. 1297 (July 21, 1992).

[12] *See* S. Res. 195, 102nd Cong. (1991) (congratulating Aung San Suu Kyi on receiving the Nobel Peace Prize and calling upon the Administration to take action against Burma); S. Res. 112, 103rd Cong. (1993) (seeking the release of Aung San Suu Kyi and encouraging adoption of U.N. sanctions); H.R. Res. 471, 103rd Cong. (1994) (urging the President, among other things, to seek the release of Aung San Suu Kyi, consider further sanctions, and encourage the international community to halt nonhumanitarian assistance to Burma); H.R. Res. 274, 104th Cong. (1995) (among other things, calling on the Burmese government to release political prisoners and engage in dialogue with Aung San Suu Kyi).

The Bush White House issued a statement "urg[ing] the Burmese military regime to transfer power to the duly elected civilian government and release all political prisoners. . . ." Statement by Press Secretary Fitzwater on the 1991 Nobel Peace Prize Winner Aung San Suu Kyi, 27 Weekly Comp. Pres. Doc. 1445 (Oct. 14, 1991). President Clinton also issued statements in support of Aung San Suu Kyi and urging the Burmese regime to release her and other political prisoners. *See, e.g.*, Statement by the White House Press Secretary, White House Office of (...continued)

While the initial responses by the United States to the deplorable acts of political suppression and human rights abuses carried out by the Burmese regime were to take the unilateral measures described above, with time "[i]t became clear . . . that unilateral actions were not sufficient to increase [*sic*] the military-led SLORC to institute reforms. Thus [the Administration] decided to mobilize multilateral efforts to increase pressures on the military regime" in Burma (as the Congress had urged in the Customs and Trade Act of 1990, *supra*). *U.S. Policy and the Situations in Burma and Thailand: Hearing of the Asian Affairs Subcomm. of the House Foreign Affairs Comm.*, 102nd Cong. (May 20, 1992) (statement of Richard Solomon, Assistant Secretary of State) (hereinafter "Solomon Statement"). In reflecting this new focus, the State Department, when it outlined the Administration's policy toward Burma in the spring of 1992, emphasized the manner in which U.S. initiatives fit into a multilateral approach to confronting the problems in Burma. *See U.S. Policy Toward Burma*, *supra*. For example, in noting that the United States cut off non-humanitarian aid to Burma, the State Department pointed out that "[w]e actively urge others to do the same and have established a consensus among the EC . . . countries, the Nordics, Australia, New Zealand, and others to withhold bilateral aid." *Id.* Similarly, in carrying out its ban on arms shipment to Burma, the Administration "worked to establish an international arms embargo on Burma" and put pressure on the European Community (now the European Union) to join in this effort. *Id.* More overtly, the United States used its sway in international affairs by "work[ing] with other interested countries to develop multilateral initiatives in the UN General Assembly and the UN Human Rights Commission" aimed at Burma. *Id.* Yet another way in which the Administration sought a multilateral solution to the Burmese

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the Press Secretary Press Release (Feb. 15, 1994) (outlining text of letter sent by President Clinton to Aung San Suu Kyi); Statement by the President on the Fifth Anniversary of the House Arrest of Aung San Suu Kyi, White House Office of the Press Secretary Press Release (July 19, 1994).

problem was by engaging in discussions about Burma with its ASEAN neighbors. *See* Solomon Statement, *supra*.

Within this delicately balanced multilateral approach consisting of Executive as well as congressional initiatives, the imposition of broad economic and trade sanctions was viewed as neither viable nor wise. Assistant Secretary Solomon testified before the House of Representatives to this effect:

> "[S]ome have argued that in addition to the steps we've already taken, further economic sanctions . . . would be helpful in bringing about reform in Burma. While I appreciate the desire to take all possible steps which might influence the SLORC, I have doubts about the effectiveness of this approach. To be meaningful, trade sanctions would have to be multilateral and comprehensive, including Burma's major trading partners. . . . [W]e have not found any international support for the imposition of trade sanctions. . . . Indeed, trade, in addition to fostering the welfare of ordinary Burmese, may be one of the ways to break down the walls of isolation which have so long separated Burma from the world." *Id.*

This policy of incrementalism, implementing measures only once they have garnered multilateral support or shown promise for doing so, has also been a hallmark of the Clinton Administration's Burma policy. In 1995, a State Department official indicated that within this context, "[a]lthough the issue of possible trade and investment embargoes is raised from time to time, we see little prospects of winning the multilateral support that would be needed to bring effective pressure on the Burmese regime." Deputy Assistant Secretary of State Thomas Hubbard, *Prospects for Progress in Burma*, Remarks at a meeting with corporate executives sponsored by the Asia Society (Mar. 8, 1995) (transcript available at the U.S. Dept. of State Geographic Bureau Electronic Research Collection).[13]

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[13] Lack of multilateral support then was one factor weighing against imposing trade or investment sanctions on Burma at that time. Another factor was the potentially destabilizing effect harsh measures against (...continued)

In September of 1995, the Administration expressed its satisfaction with the then-current mix of initiatives aimed at Burma as having struck the appropriate balance for accomplishing the foreign-policy goals of the National government. One State Department official expressed this point in noting that "[i]n order to encourage a political dialogue to begin, the Administration will maintain existing U.S. measures in place in Burma for the time being." *Developments in Burma: Hearings Before the Asia and the Pacific Subcomm., House Comm. on Int'l Relations*, 104th Cong. (Sep. 7, 1995) (statement of Kent Wiedemann, Deputy Assistant Secretary of State). He further indicated that the imposition of sanctions would be ill-timed and too harsh, especially since the regime had recently released Aung San Suu Kyi from prison:

> "[W]e believe it would be counterproductive to impose sanctions now. . . . [W]e must now allow time for a dialogue of national reconciliation to begin before seeking to raise the pressure, which could have consequences opposite to those we seek." *Id.*

He went on to address the point that multilateral support is of great importance in crafting the Nation's Burma policy, especially in regard to the possible imposition of trade and commercial sanctions:

> "We have discussed multilateral sanctions with interested countries, and there is no support for them against Burma, particularly in the wake of Aung San Suu Kyi's release. Furthermore, we are concerned that some sanctions provisions, which call for actions against third countries, might violate our obligations under the WTO. We would not want to be required to take punitive actions against

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Burma might have. Several Asian countries were concerned that "Western efforts to isolate Burma [would] leave an open field for Chinese trade and influence." Solomon Statement, *supra*. Such concerns necessarily exerted a tempering influence on U.S. policy vis-à-vis Burma.

countries on whom we need to rely to make common cause in other ways on Burma." *Id.*[14]

These concerns about the appropriateness of further sanctions directed at Burma were also reflected in congressional reluctance to enact such measures for several years after 1990.[15] Then, in 1996, the Congress considered and passed legislation that now contains what are considered the federal Burma sanctions. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 § 570, 120 Stat. 3009 (1996). The provisions of this act reflect a tailored approach to the Burmese problem. It provides for certain mandatory measures against Burma, including a ban on most bilateral assistance to Burma, opposition to multilateral assistance, and denial of entry visas to Burmese government officials.[16] Additionally, the Congress authorized the President to

[14] Instead of sanctions, the Administration took alternative steps to bring to bear multilateral pressure on Burma. In June 1996, the same month that Massachusetts enacted its procurement sanction, President Clinton appointed Ambassador William Brown and Stanley Roth as Special Envoys on Burma, their first task being to "visit several ASEAN states and Japan . . . to seek a coordinated response to ongoing developments in Burma." Special Envoys on Burma, Statement of the White House Press Secretary, White House Office of the Press Secretary Press Release (June 7, 1996).

[15] *See, e.g.*, Burma Freedom and Democracy Act of 1995, S. 1511, 104th Cong, (1995) (contemplating a possible range of mandatory and discretionary sanctions on Burma); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1996, H.R. 1868 §§ 801-803, 104th Cong. (1995) (enacted as Pub. L. No. 104-107, 110 Stat. 704 (1996) without proposed section banning new investment in Burma, government assistance to Burma, and importation of Burmese products); Burma Freedom and Democracy Act of 1995, H.R. 2892, 104th Cong. (1996) (containing proposed mandatory sanctions as well as a long list of discretionary sanctions).

[16] President Clinton went further by restricting the entrance into the United States of Burmese nationals involved in impeding Burma's democratic development. Presidential Proclamation, 32 Weekly Comp. Pres. Doc. 1957 (Oct. 3, 1996). In so doing, the President exercised his authority under the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1182(f) and 1185 (1994).

ban new investment (but not other trade relations) in Burma if he were to determine that the Burmese regime harmed, rearrested, or exiled Aung San Suu Kyi or "committed large-scale repression of or violence against the Democratic opposition." Additionally, this law specifically instructed the President to "seek to develop. . . a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma. . . ."

The President exercised this authority to impose discretionary sanctions upon Burma when, in April 1997, he announced his decision to ban new investment in Burma. *Investment Sanctions in Burma*, Statement by the President, White House Office of the Press Secretary Press Release (Apr. 22, 1997). The President issued an executive order to this effect the following month. *See* Exec. Order No. 13047, 62 Fed. Reg. 28301 (May 20, 1997).[17] Imposed one year after the Massachusetts law was enacted, this Executive Order specifically exempted from its coverage, as the 1997 statute required, contracts to purchase goods or services as long as such activities did not entail prohibited investment in or development of resources in Burma. *See id.* § 3.

Thus, even after the Massachusetts Burma Law was enacted, neither of the federal political branches sought to impose sanctions on private parties as far reaching as those imposed by the State.

Since 1997, the President has submitted semiannual reports to the Congress regarding implementation of the federal Burma sanctions. In these documents, the President has emphasized the importance of a multilateral focus in addressing the problems in Burma. In June 1997, the year after the Massachusetts Burma Law was passed and immediately before the European Union and Japan

[17] The President cited not only the recent congressional Burma sanctions provisions as authority for this Executive Order, but also the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* (Supp. II 1996) and the National Emergencies Act, 50 U.S.C. § 1601 *et seq.* (1994). *Id.* Pursuant to this Executive Order, the Office of Foreign Assets Control of the Department of Treasury issued the Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (1998).

lodged complaints against that law in the WTO, the Administration stated the following in its implementation report:

> "In recent months we have forged a vigorous multilateral strategy to seek improvements in our key areas of concern. We consult about Burma regularly and at senior levels with leaders of ASEAN nations, Japan, the European Union, and other countries having major trading interests in Burma. These efforts have helped build and maintain strong international pressure on the SLORC." *Conditions in Burma and U.S. Policy Toward Burma*, U.S. State Dept. Report Submitted to Congress (June 13, 1997).[18]

The report goes on to list measures taken against Burma by the Administration and then to place these measures against a broader international background:

> "We likewise have encouraged ASEAN, Japan, the EU and other nations to take similar steps. . . . Many nations join us in our arms embargo, including European countries, Canada, Australia and Japan. The EU and Japan limit their assistance to Burma to humanitarian aid. . . . In November, at our urging, the EU and associated European states joined us in imposing a ban on visas for high-level SLORC officials and their families. In addition, the European Commission has recommended that the European Union withdraw GSP [Generalized System of Preference] trade benefits from Burma's agricultural and industrial products . . . which would bring European trade policy in line with the U.S. ban on GSP." *Id.*

It is thus clear that the National government takes quite seriously the principle of incrementalism. Under Secretary of State Stuart Eizenstat emphasized this point in arguing that sanctions should be imposed only after careful consideration and as a last resort:

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[18] Report available through U.S. State Dept. on-line electronic database of press releases <http.www.state.gov/www/regions/eap/970613_us-burma-report.html> (last updated Feb. 1, 2000).

> "Our first line of action against other countries should be to aggressively pursue all diplomatic options that are available to us. Such measures can range from the symbolic . . . to denying visas to target figures, entering into security arrangements with neighboring countries, and, as an ultimate resort, military intervention and everything in between. . . . *Economic sanctions involving restrictions on the private sector, when they are unilateral, should be considered only after these alternative prior measures have been aggressively pursued and have failed or have been judged inadequate or inappropriate.*" *How Sanctions Can Affect U.S. Policy Interests: Hearings Before House Int'l Relations Comm.*, 105th Cong. (June 3, 1998) (statement of Stuart Eizenstat, Under Secretary of State for Econ., Bus., and Agric. Affairs) (emphasis supplied).

Another senior State Department official did not hesitate to condemn the Massachusetts Burma Law, which flew in the face of the established approach to Burma, as a hindrance to the conduct of U.S. foreign policy and a disruption to the approach to Burma taken by the National government:

> "Congress and the President carefully tailored the precise measures the federal government would impose in seeking to influence change in Burma. Those measures included diplomatic and economic actions, including a Presidential executive order banning new investment in Burma by U.S. persons. *These measures reflect a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there.*" Assistant Secretary of State Alan P. Larson, *State and Local Sanctions*, Remarks to the Council of State Governments (Dec. 8, 1998) (emphasis supplied).[19]

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[19] Transcript available on the Organization for International Investment web site <http:\\ofii.com/resources/legis> (last updated Feb. 3, 2000).

The Assistant Secretary went on to declare that the Massachusetts procurement statute "has hindered our ability to speak with one voice on the grave human rights situation in Burma, become a significant irritant in our relations with the EU and impeded our efforts to build a strong multilateral coalition on Burma where we, Massachusetts and the EU share a common goal." *Id.*[20]

B. A Per Se Rule Would Protect the National Government's Ability To Choose Among All of the Available Options In Response To a Specific Foreign-Policy Issue.

In most of the cases in which the Court has held State or local foreign-relations legislation unconstitutional, the existence of a federal statute directed to the same issue led the Court to apply a "preemption analysis" under Article VI. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), a three-judge District Court had declared Pennsylvania's Alien Registration Act unconstitutional on two grounds, one being that the Act "encroached upon legislative powers constitutionally vested in the federal government." 312 U.S. at 60. By the time the case reached this Court, however, the Congress had enacted legislation similar to the Pennsylvania law, and the Court decided that it must "pass upon the state Act in light of the Congressional Act." *Id.* The Court characterized the federal Act as "a complete scheme of regulation [which] the states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement . . . or enforce additional or auxiliary regulations." *Id.* at 66-67. After carefully reviewing the two enactments, the Court held that the State law undermined the federal law and therefore could not stand.

As shown in the preceding section of this brief, at various times since 1988 the political branches of the National government have given attention to the dreadful situation in Burma and have made a series of judgments about what the policy of the United States should be with regard to that situation. As the Burma case

[20] It is notable that the Massachusetts law affects foreign corporations as well as those domiciled in the United States.

illustrates, at times, non-action or limited action has been a carefully selected foreign-policy choice resulting from such judgments. Moreover, the National government has paid close attention to consensus-building in formulating policy toward Burma, and to this end it has avoided adopting measures that would be unpalatable to other countries.

If States and localities are free to adopt sanctions legislation until the Congress enacts federal legislation and either "occupies the field" or specifically preempts State or local initiatives, the foreign policy of the Nation would be in complete disarray. The power to act would repose not in Washington but in fifty State capitals and in thousands of city and county councils. Moreover, when the federal response is to take only limited action – such as imposition of an arms embargo – or to take diplomatic steps in close cooperation with allies, it would be extremely difficult for a federal judge to conclude that these steps represented the "complete scheme of regulation" that is required before a State scheme is preempted under *Hines*. *Id.* at 66.[21] If States and localities had enacted sweeping Burma sanctions legislation in 1989 or 1990, for example, the foreign policy of the United States would suddenly have become very different from the graduated approach which the Congress and the President judged appropriate. This would be an unacceptable result.

In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court struck down an Oregon probate statute as an unconstitutional intrusion into the exclusively federal field of foreign relations even though there was no federal statute (or Executive Order) covering the subject of the State law. The Court noted that laws regarding disposition of estates fell within the traditional power of the States. This particular statute, however, introduced a different element, for it required State probate courts to engage in minute examination of foreign governments' policies and laws with regard to confiscation of property. This, the Court held, represented "an intrusion by the

[21] This difficulty is especially pronounced in the case of an arms embargo, which often, as this one did, takes the form of discretionary denial of export licenses.

State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432. Although there are situations in which a State's laws might, permissibly, have "'some incidental or indirect effect in foreign countries,'" in this case State courts "launched inquiries into the type of governments that obtain in particular foreign nations" and other such aspects of the foreign relations of the United States, which is beyond their power under the Constitution. *Id.* at 434 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)). Such activities have a "great potential for disruption or embarrassment," *id.* at 435, of the United States and "may well adversely affect the power of the central government to deal with those problems." *Id.* at 441.

Justice Stewart, joined by Justice Brennan, would have gone further. Whether the State law "unduly interferes" with the conduct of foreign relations by the National government is "not the point." Instead, he wrote, "We deal here with the basic allocation of power between the State and the Nation." *Id.* at 443 (Stewart, J., concurring).

In other words, *Zschernig* stands for the proposition that, even in the absence of federal legislation or Executive action on the issue at hand, a State's "intrusion into the field of foreign affairs" is at least sometimes prohibited by the Constitution.

In *De Canas v. Bica*, 424 U.S. 351 (1976), this Court considered a California measure which imposed criminal sanctions upon employers who knowingly employed aliens not lawfully admitted to residence in the United States *if* such employment would have had an adverse effect on workers who were lawful residents. The Court determined that the California measure merely *touched on* immigration matters and thus applied a preemption analysis in examining its validity. If, however, the State measure had constituted actual regulation of immigration, which is "unquestionably exclusively a federal power," *id.* at 355, it would have been "constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." *Id.* at 356. The Court thus expanded *Zschernig* by indicating that the Constitution itself proscribes conduct by States that trespasses into an exclusively federal realm, regardless of the

presence or absence of federal measures within that realm or any interference or disruption thereof.

In *Zschernig* it was necessary for the Court to examine the manner in which the Oregon statute at issue there was actually applied in practice, because (a) the statute was within the traditional area of State police power and (b) whether or not it intruded into the exclusive foreign-policy making realm of the National government was not evident on the face of the statute. In the case of sanctions legislation, however, no such detailed analysis is necessary because (a) imposing sanctions against foreign governments or entities who engage in otherwise lawful activity with such governments is not a traditional exercise of a State's police powers and (b) a State or locality imposing sanctions of the sort Massachusetts enacted is necessarily and obviously intruding into the exclusively federal realm of foreign-policy making, regardless of how such sanctions operate or are implemented.

It follows that State and local sanctions laws should be declared per se unconstitutional. Such a per se rule would protect the ability of the political branches of the National government to decide precisely what level of response, *if any*, to a given foreign-policy situation would best serve the Nation's interests. Otherwise the National government would be severely handicapped in its ability to follow a process of gradualism, beginning with mild measures and quiet diplomacy and escalating or scaling back as circumstances warrant, and to coordinate foreign-policy responses with our allies.

C. A Per Se Rule Would Also Relieve Federal Judges of the Need to Discern the Contours of the Nation's Foreign Policy With Regard To the Subject of the Particular State or Local Law Under Review, a Task They Are Not Well Suited To Carry Out.

As already shown, the *Hines* preemption approach requires a federal judge to discern the contours of the National law and the policy it represents and then to make a judgment about whether the State law unduly interferes with the National program. The Court

acknowledged that it was imposing a relatively standardless burden on federal judges:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference."

The Court continued:

> "But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. *Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*" 312 U.S. at 67 (emphasis supplied).[22]

This required, the Court said, examination of "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law" to determine "whether supreme federal enactments preclude enforcement of state laws on the same subject." *Id.* at 70.

Most federal judges have little or no experience with foreign-policy matters, and there is no readily available mechanism for rectifying this deficiency. Judges have available to them none of the wide array of information sources on which the National political branches rely when they formulate foreign policy. These

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[22] In a footnote at this point the Court quoted from *Savage v. Jones*, 225 U.S. 501, 533 (1912), in part as follows:

> "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed." 312 U.S. at 67 n.20.

include of course the expertise of institutional actors such as the State Department with its embassies in other countries and the office of the U.S. Trade Representative. In addition, both the Congress and the President benefit from the input of numerous military, economic, and trade advisers in the form of congressional staff, policy analysts, and scholars and industry leaders who act as consultants and testify before and provide assistance to congressional committees.[23]

But the unavailability of information is not the sole obstacle to accurate judicial determination of the precise contours of the National foreign policy. In developing specific foreign-policy responses, lawmakers normally balance a broad spectrum of interests, local, regional and national, encompassing subjects ranging from national security to market and currency stability to human rights. Such policy making also requires orchestration such that each measure taken in regard to a particular foreign nation fits into a comprehensive approach to relations with that country and the region of which it is part. Foreign policy also takes into account U.S. multilateral and bilateral commitments to a variety of instruments, accords, agreements, and treaties, as well as less formal political commitments and informal understandings with the governments of other nations. Judges, not to mention State legislators and local leaders, lack the proper perspective to perform such a task.

Moreover, judges lack political accountability in regard to foreign affairs. There is a longstanding tradition that the judiciary defers to "the political branches in matters of foreign policy." *Regan v. Wald*, 468 U.S. 222, 242 (1985). Federal courts do not

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[23] Seeking advice from the then-current Administration may not be very helpful to a court. In *Zschernig* the Administration advised the court that the Oregon statute under review did not interfere with the conduct of foreign relations, 389 U.S. at 434, but the Court struck the statute down anyway. Justice Stewart, in his concurring opinion, said that whether State law "unduly interferes" with foreign relations "is not the point." Instead, he stated, the issue was "the basic allocation of power between the States and the Nation," which cannot be resolved by the "shifting winds at the State Department." *Id.* at 443 (Stewart, J., concurring).

conduct "independent foreign policy analysis," for such matters "'are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Id.* (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). *See also Sabbatino*, 376 U.S. at 412.[24]

A per se rule would avoid the need for precise evaluations of foreign policy by federal judges. Such a rule would define the circumstances under which the State or local enactment could not stand, without requiring a detailed analysis of federal foreign policy and the effect of the State's law on it. The judge's task would be at an end if she determined that the State or local legislation (1) was enforceable, and (2) imposed, either directly or indirectly, significant disadvantages on a foreign country in seeking to change the government or policies of the government of that country.[25] If that determination is made – and it certainly would be in a case like this one – the State or local enactment would be unconstitutional.

D. The Congress Should Not Be Required To Adopt Express Preemption Legislation In Order To Prevent States and Localities from Interfering With the Conduct of the Nation's Foreign Policy.

Petitioners contend that State and local foreign-policy legislation is preempted only when the Congress has expressly acted to achieve that result. Thus, Petitioners say, because the Congress was aware of the Massachusetts Burma law when it enacted the federal Burma sanctions legislation, and because the Congress nonetheless did not explicitly preempt the Massachusetts law, the Congress must have intended the Massachusetts law to stand alongside the federal program. (Pet. Br. at 15-17, 19-21.)

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[24] It would be completely contrary to this longstanding principle of deference for courts to search the congressional record for evidence that the Congress intended to "approve" a State or local foreign-policy initiative, as is suggested by congressional amici who support Petitioners. (Cong. Br. Supp. Pet. at 7-11.)

[25] *See* note 5, *supra*.

These amici earnestly request that the Court not adopt such an "express preemption" requirement. As set forth above, the political branches must be free to decide that the most appropriate foreign-policy response in a given case is to take no formal action. Acceptance of Petitioners' view, however, would mean (1) that the Congress would need to make itself aware of the purported foreign-policy making of thousands of State and municipal governments and (2) that once the Congress learned of such programs and wished them displaced, the following would need to happen: A bill would need to be introduced, committee hearings would need to be held, debate would need to occur in both Houses, and the bill would need to command majorities in both Houses and be signed by the President. Yet if it is the judgment of the political branches that "quiet diplomacy" was the appropriate approach to the problem at hand, such a public legislative process would roundly defeat that goal. Moreover, there would be intolerable political pressure on the Congress not to direct legislation at specific States and localities and not to announce through legislation that their "tough" approach would not be appropriate.

Congressional failure to include preemption language in the federal 1996 Burma sanctions legislation can under no circumstances be deemed to be "approval" of the Massachusetts Burma Law, as Petitioners and their congressional supporters urge. (Pet. Br. at 14-16, 19-21; Cong. Br. Supp. Pet. at 9.) In arguing that the National government implicitly condoned the Massachusetts law, Petitioners rely heavily on the case of *Barclays Bank PLC v. Franchise Tax Board of Calif.*, 512 U.S. 298 (1994). There the Court upheld California's formula for determining how much of a multinational corporation's income was taxable by California. The Court's decision in *Barclays*, however, rests on an interpretation of the Commerce Clause, not on the foreign-policy authority of the National government. We adopt the position of Respondent in regard to the relevance of *Barclays* to the case now before the Court and add only the following observation:

Reliance on *Barclays* is also misplaced because *Barclays* is a tax case. Courts and commentators have often viewed tax cases as existing within a distinct legal subset because of the complexity and special character of the field. The analysis in *Barclays* shows that review of tax statutes raises concerns not present in other

Commerce Clause inquiries and indeed necessitates a unique legal framework. Specifically, the Court in *Barclays* indicated that a "state tax on . . . commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax: (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates aga interstate commerce; or (4) is not fairly related to the services provided by the State." *Barclays*, 512 U.S. at 310-11 (citation omitted). In the case of tax measures affecting foreign commerce, the Court noted that two additional factors must be considered: the risk of multiple taxation and interference with the ability of the National government to "speak with one voice" in foreign affairs. *Id.* at 311; *see Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979). These factors comprise a test quite different from that applied to State regulation of foreign commerce through non-tax measures.

It was contended that the California tax at issue in *Barclays* was unconstitutional because, *inter alia*, it prevented the National government from "speaking with one voice." The Court rejected this argument, holding that States are free to tax businesses that operate within their borders, for the Commerce Clause "does not shield interstate (or foreign) commerce from 'its fair share of the state tax burden.'" 512 U.S. at 310 (quoting *Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978)). In this area of taxation of multinational businesses, the Court held, it is the Congress, not the courts (or the Executive), that must decide whether it is necessary for the Nation to speak with "one voice," and the Congress had not spoken to the precise issue involved in the case. By not speaking, the Congress essentially determined that national uniformity was not required in regard to the tax accounting method to be applied in taxing multinational businesses. The Court could find no reason in the Constitution to impose a burden of speaking on its sister branch of government.

Here, too, the Congress should not be required to act. The consequence of congressional non-action in regard to foreign policy, however, is quite different from the tax realm. In the tax realm and perhaps in other areas of commerce as well, it is up to the Congress to decide *whether or not* to speak with one voice. In the case of foreign policy, however, the Constitution *requires* that

the National government speak with one voice. Whether the Congress or the Executive exercise this prerogative vociferously through strong measures such as sanctions, quietly through limited diplomatic approaches, or simply by silence, the result is the same. Whether the Congress "speaks" through action or through silence does not affect the constitutional underpinning that States may not engage in foreign-policy making. Unlike the need to impose taxes, States have no inherent need to enact foreign-policy legislation, and thus to deny them that power does not leave them adrift. The citizens of the States are, after all, represented in the National government, where their representatives are free to determine *collectively* the foreign-policy response that would be most suitable in regard to Burma and other matters of foreign affairs. They should not, however, be permitted to "go it alone."

CONCLUSION

For the reasons set forth herein, the Court should adopt the per se rule on unconstitutionality for State and local sanctions legislation and under it declare the Massachusetts Burma Law unconstitutional. The decision below should be affirmed.

Respectfully submitted,

Of Counsel:

Eric D. Brown
COVINGTON & BURLING
Washington, D.C.

W. Thomas McCraney, III
WATKINS & EAGER, PLLC
Jackson, Mississippi

John Vanderstar
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
(202) 662-5540

Charles Clark
WATKINS & EAGER, PLLC
Post Office Box 650
400 East Capitol Street
Jackson, Mississippi 39205
(601) 948-6470

Counsel for Amici Curiae

February 14, 2000

No. 99-474

In the Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR GERALD R. FORD, LEE H. HAMILTON, CARLA A. HILLS, AND CERTAIN OTHER FORMER U.S. GOVERNMENT OFFICIALS AS AMICI CURIAE SUPPORTING RESPONDENT

(Complete List of Amici Appears on the Inside Cover)

ANDREW N. VOLLMER
CAROL J. BANTA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
202-663-6000

MARTIN S. KAUFMAN
Counsel of Record
EDWIN L. LEWIS, III
ATLANTIC LEGAL FOUNDATION
205 East 42d Street
New York, New York 10017
212-573-1960

Counsel for Amici Curiae

February 2000

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Complete list of amici curiae:

James A. Baker, III
Griffin B. Bell
Nicholas F. Brady
William E. Brock
Frank C. Carlucci
Richard B. Cheney
Frederick B. Dent
Lawrence S. Eagleburger
Gerald R. Ford
Barbara Hackman Franklin
Sam M. Gibbons
Alexander M. Haig, Jr.
Lee H. Hamilton
Carla A. Hills
Juanita M. Kreps
Melvin R. Laird
Robert S. McNamara
Edwin Meese, III
G. William Miller
Leon E. Panetta
William J. Perry
Peter G. Peterson
Donald H. Rumsfeld
Brent Scowcroft
George P. Shultz
William E. Simon
Robert S. Strauss
Clayton Yeutter

Biographical information about each of the amici curiae appears in the Appendix to this brief.

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No. 99-474

In the Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR GERALD R. FORD, LEE H. HAMILTON, CARLA A. HILLS, AND CERTAIN OTHER FORMER U.S. GOVERNMENT OFFICIALS AS AMICI CURIAE SUPPORTING RESPONDENT

The former senior U.S. government officials listed and described in the Appendix ("Former U.S. Government Officials") respectfully submit this brief as amici curiae supporting the respondent, the National Foreign Trade Council.[1] Because they believe that state action like the Massachusetts Burma Law interferes with the conduct of effective foreign policy by the United States, the Former U.S. Government Officials urge the Court to affirm the First Circuit in this case.

[1] The parties consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. Counsel for a party did not write any part of this brief. No one other than the Former U.S. Government Officials and their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE AMICI CURIAE

As indicated in the brief biographies in the Appendix to this brief, the Former U.S. Government Officials held high level foreign policy positions in earlier Administrations or Congresses. Those positions include President, Secretary of State, Secretary of Defense, Secretary of the Treasury, Secretary of Commerce, U.S. Trade Representative, National Security Adviser, and Member of Congress with significant foreign relations responsibilities. In those capacities, the Former U.S. Government Officials had the duty to help formulate and implement the foreign, national security, and international trade policies of the United States and represent the United States in its relations with foreign countries and international organizations.

Each of the Former U.S. Government Officials has a significant interest in the way the Court resolves this case. They understand the complexity of conducting effective international relations and the practical realities of and constraints on that task. Based on their experience, they believe that permitting state or local governments to affect U.S. foreign relations by taking actions such as the Massachusetts Burma Law would considerably complicate and harm the ability of federal officials to conduct effective foreign policy. Because they no longer hold official positions with the U.S. government, they have greater latitude to express these views to the Court free from domestic political considerations. Accordingly, for the benefit of current and future U.S. foreign policy, national security, and international trade officials and the conduct of U.S. foreign policy, the Former U.S. Government Officials want to ensure that the Court resolves the issues in this case

with an understanding of the practical considerations underlying their views.[2]

SUMMARY OF ARGUMENT

The Court should affirm the court below because state and local trade sanctions significantly impede the ability of the federal government to conduct the foreign policy of the United States. They cause conflicts and tensions with foreign countries, provoking responses from those countries that, as a matter of international law and as a practical matter, require the attention of the President and federal foreign policy officials. The need for national officials to attend to the disruption caused by state and local action interferes with higher priorities on the U.S. foreign policy agenda.

State and local trade sanctions confuse foreign countries about the foreign policy of the United States by diluting the uniformity and clarity of the nation's position. Confusion about the U.S. policy hampers the ability of national officials to build coalitions with other nations and to bargain with foreign countries effectively, especially in international trade negotiations.

Finally, state and local trade sanctions harm national foreign policy because state officials lack sufficient information to make informed foreign policy judgments. The federal government has access to considerable information about foreign countries and the interests of the entire United States. State and local decisionmakers do not have access to this full range of information, do not have a national perspective, and therefore take actions inconsistent with the carefully balanced national policy.

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[2] The views expressed by the Former U.S. Government Officials are their own and are not necessarily those of firms, clients, or others related to them.

ARGUMENT

STATE AND LOCAL TRADE SANCTIONS SIGNIFICANTLY IMPEDE THE ABILITY OF THE FEDERAL GOVERNMENT TO CONDUCT THE FOREIGN POLICY OF THE UNITED STATES.

The experiences of the Former U.S. Government Officials in senior foreign policy, national security, and international trade positions of the federal government firmly convince them that allowing state and municipal governments in the United States to adopt trade sanctions aimed at foreign countries ("state and local trade sanctions") would materially interfere with the ability of the national government to conduct effective international negotiations and relations. This view is based on a variety of practical considerations learned during their tenures as U.S. government officials, and the purpose of this submission is to describe those practical considerations for the Court. The purpose of this brief is not to restate the legal arguments, which the parties and other amici curiae will ably present.

Before discussing the practical ways in which state and local action interferes with U.S. international relations, the Former U.S. Government Officials need to make several introductory points to ensure a complete understanding of their position:

First, the Former U.S. Government Officials deplore the human rights record of the current regime in Burma (Myanmar). This case is not about the behavior of that government, however; it is about the proper allocation of authority between the national and state governments for the regulation of international trade and the conduct of the foreign policy of the United States.

Second, the greatest, but by no means the only, concern of the Former U.S. Government Officials is a state or local official act that has the purpose of affecting or has a persistent or substantial effect on the interests or policies of a foreign sovereign. The Massachusetts Burma Law and other state and local trade sanctions are such acts.[3] Their purpose is to create a local foreign policy. As the Petitioners' brief admits, the objective of the Massachusetts Burma Law is to cause economic damage to a foreign government and use that pressure to change the policies and practices of the government. This is the category of state and local actions the Court should address in this case.

The Former U.S. Government Officials do not believe that this case requires a rule that reaches further. They appreciate that, in today's interdependent world, almost any state action, even one of general applicability, can have an incidental or unintended effect on U.S. foreign policy or on the sovereign interests of a foreign country. International relations cover an extremely wide range of activities, from war and peace, to rules of international trade, to treatment of diplomats and the citizens of other countries. Although the occasional state action not intended to affect a foreign country can roil U.S. foreign relations,[4] identifying a workable legal standard to prevent all of those situations would be difficult and is unnecessary here.

Third, the practical concerns the Former U.S. Government Officials have about the risk of interference in U.S. foreign policy from state and local actions arise even when those actions have the same general goal as a federal policy or federal sanctions. To the extent the approach of

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[3] Thus, Zschernig v. Miller, 389 U.S. 429, 440 (1968), which invalidated an Oregon probate law that "affect[ed] international relations in a persistent and subtle way," governs this case.

[4] See, e.g., Breard v. Greene, 523 U.S. 371 (1998).

states or municipalities differs from a federal approach, even if only as a matter of tactics or emphasis, the problems described below do or can occur. Similarly, the concerns arise even when the Constitution or a federal statute does not explicitly prohibit or preempt the state action.

We now turn to our description of the practical ways in which state and local trade sanctions disrupt the ability of the federal government to conduct an effective foreign policy.

A. State and Local Trade Sanctions Cause Conflicts with Foreign Nations That U.S. Officials Must Address to the Detriment of Higher Foreign Policy Priorities.

State and local trade sanctions and other foreign policy actions cause conflict and tensions with foreign countries. The President and federal foreign policy officials must address these issues to the detriment of higher priorities on the foreign policy agenda.

Sanctions offend the targeted foreign country and, when the trading restrictions apply to the companies of friendly foreign countries, as the Massachusetts Burma Law does, irritate our trading partners. When targeted countries are offended or trading partners are irritated, they direct responses to the national government.

Federal officials must deal with foreign reactions to state and local foreign policy measures because, both as a legal and a practical matter, the federal government and federal officials are accountable to foreign governments for the behavior of state governments. Under international law, a nation with subunits of states or provinces is responsible to other nations for the conduct of the subunits.[5] "The

[5] Restatement (Third) of the Foreign Relations Law of the United States § 207 (1987) ("Third Restatement"); Ian Brownlie, Principles of Public International Law 449 (4th ed. 1990).

United States has consistently accepted international responsibility for actions or omissions of its constituent States and has insisted upon similar responsibility on the part of the national governments of other federal states."[6]

As a practical matter, federal officials also are the ones who must deal with the foreign reactions because the responses of foreign governments nearly always affect the nation as a whole or the relations between senior federal officials and their foreign counterparts. Foreign responses range from diplomatic protests that complicate existing negotiations on other issues, to formal charges that a state's action violated international law or agreements, to retaliatory measures that affect the entire United States and not just the offending state.[7] In extreme cases, the state action could lead to hostilities between the United States and a foreign power.

Efforts to address these responses significantly interfere with the existing U.S. foreign policy agenda. State foreign policy actions exact a high price from the nation in distractions, compromises, and lost opportunities:

> Too often we find ourselves answering criticism about certain state and local actions rather than focussing on the poor behavior of the object of those actions. . . . Measures by states that transgress our international

[6] Third Restatement § 207, Reporters' Note 3 (citing authorities).

[7] See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 450 (1979) (retaliation of foreign nations "of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer"); Chy Lung v. Freeman, 92 U.S. 275, 279 (1876) (international claims are made on the United States, not an offending state, and, in the case of war or suspension of relations, the entire United States would suffer); Peter J. Spiro, Symposium, "Foreign Relations Federalism," 70 U. Colo. L. Rev. 1223, 1252 n.130 (1999).

obligations embroil us in disputes that could easily be avoided. Discord with our allies weakens opposition to rogue regimes and trade disputes can impair cooperation that is essential to bringing about meaningful change . . . .[8]

These concerns about foreign reactions to state action are not fanciful. The Massachusetts Burma Law has provoked many foreign protests that national officials have had to manage. For example, Japan, the European Union, and the Association of South East Asian Nations lodged objections with the State Department. Japan and the European Union later filed formal complaints against the United States in the World Trade Organization arguing that the Massachusetts law breaches a WTO agreement on government procurement.[9]

At one point, European officials told senior State Department representatives that they would not cooperate on sanctions against Burma until the Massachusetts situation was resolved.[10] Thus, the Massachusetts law actually

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[8] Testimony of Deputy Assistant Secretary of State David Marchick before the Maryland House of Delegates Committee on Commerce and Government Matters (Mar. 25, 1998) <http://www.usaengage-.org/legislative/marchick.html>.

[9] See United States - Measure Affecting Government Procurement, WT/DS88/3 (Sept. 9, 1998) (European Union); United States - Measure Affecting Government Procurement, WT/DS95/3 (Sept. 8, 1998) (Japan); European Comm'n, Report on United States Barriers to Trade and Investment § 4.6, at 32 (1999) (noting that the European Union had suspended the proceedings of the WTO panel pending resolution of this case); National Foreign Trade Council v. Natsios, 181 F.3d 38, 54 (1st Cir. 1999); "A State's Foreign Policy: The Mass that Roared," The Economist, Feb. 8, 1997, at 32.

[10] Robert S. Greenberger, "States, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners," Wall St. J., Apr. 1, 1998, at A20.

impaired the effectiveness of U.S. policy on Burma's human rights violations.

Relying on the national legislative process to address and preempt state or local foreign policy actions that threaten to interfere with U.S. international relations is not a solution. Senior foreign policy officials in the Executive Branch and Congress do not have the time or resources to monitor state and local initiatives, anticipate those that could disrupt U.S. foreign relations, and then, in each case, upset complex national legislative priorities to enact pre-emptive federal statutes. In addition, article I, section 10, clause 3 of the Constitution indicates a preference for Congress to act in advance to authorize a state activity in the foreign affairs area rather than for congressional action that prohibits or preempts state activity that already occurred.

B. State and Local Trade Sanctions Confuse Foreign Countries About the Foreign Policy of the United States and Detract from the Ability of the United States To Achieve Its Goals and Lead in the International Community.

State and local trade sanctions and similar international policy efforts also impede U.S. foreign relations by confusing foreign countries about the position of the United States. Thus, they detract from the ability of the United States to achieve its goals and to lead in the international community.

State foreign policy actions such as trade sanctions dilute the uniformity and clarity of the nation's stance.[11]

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[11] See, e.g., Greenberger, supra note 10 (quoting a European Union trade official complaint that state and local sanctions send "conflicting signals about who determines U.S. foreign policy"); Robert E. Pierre, "Md. Bill Targeting Nigeria Stirs Ire, State Dept. Opposes Sanctions Proposal," Wash. Post, Mar. 27, 1998, at B1 (U.S. officials said that "state

They raise doubts and confusion in the minds of foreign policymakers about the U.S. position, its commitment to a particular course, and the stability of its policy. They can lead to miscalculations, possibly dangerous miscalculations, by foreign governments. They also create uncertainty about whether the U.S. officials represent all or only part of the United States.

The purpose of centralizing foreign affairs powers in the national government and particularly in the Executive Branch was in part to avoid these problems of confusion and dilution. Alexander Hamilton, when explaining the need for a single executive under the proposed Constitution, cogently identified the practical difficulties that would occur if more than one person had significant authority in areas of national concern:

> Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. ... Whenever [bitter dissensions] happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide. If they should [occur in the executive of a country], they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state.[12]

Specifically in the foreign affairs arena, both this Court and academic theorists have confirmed what Hamilton viewed as the "dictates of reason and good sense."[13] The

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sanctions would leave the United States sending mixed messages to foreign countries").

[12] The Federalist No. 70, at 453 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961).

[13] Id.; see also The Federalist No. 42, at 302 (James Madison) (Benjamin Fletcher Wright ed. 1961).

Court has long recognized that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."[14] Scholars have studied the institutional characteristics necessary for the successful execution of foreign policy and agree that a single, unitary decision maker is most effective.[15] Expanding the role of states and localities in international relations would be antithetical to this structure and to Hamilton's vision of an effective national executive.

Experience also confirms that, in several different ways, the potential for confusion or lack of clarity in the U.S. position and message impairs the ability of federal officials to achieve their foreign policy goals. For example, it reduces the willingness of foreign nations to align with the United States: "[S]tate sanctions often can confuse the message the United States sends and impede our ability to build coalitions to focus on the targeted regime."[16] As

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[14] United States v. Pink, 315 U.S. 203, 233 (1942); see also Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (the federal government "is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties," and "federal power in the field affecting foreign relations [must] be left entirely free from local interference") (emphasis added); United States v. Belmont, 301 U.S. 324, 331 (1937) (in "respect of our foreign relations generally, state lines disappear"); Board of Trustees v. United States, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power") (emphasis added); Chinese Exclusion Case, 130 U.S. 581, 606 (1889); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840) ("It was one of the main objects of the [C]onstitution to make us, so far as regarded our foreign relations, one people, and one nation").

[15] See John Yoo, "Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act," 20 Hastings Int'l & Comp. L. Rev. 747, 769-71 (1997) (discussing Thomas Schelling, The Strategy of Conflict (1960); Graham Allison, Essence of Decision: Explaining the Cuban Missile Crisis (1971)).

[16] Marchick, supra note 8 ("state and local sanctions may impair the

mentioned above, the Massachusetts Burma Law had exactly this effect on U.S. efforts to persuade European officials to cooperate on sanctions against Burma.

Thus, the possibility of mixed messages and differing positions is especially harmful when the United States considers the use of international trade sanctions to accomplish a foreign policy goal. The clear lesson of the last fifty years is that many countries must impose the same trade restrictions to have a realistic chance of altering the behavior of a rogue regime.[17] When trade sanctions are not multilateral, the targeted foreign country can obtain supplies or markets in other countries, and the sanctions end up hurting only the restricted U.S. businesses. Policymakers are increasingly skeptical of the effectiveness of trade sanctions imposed by the United States alone much less the far more limited ones a state or local government can adopt. Only the federal government has the foreign relations capability of seeking and obtaining the agreement of other countries to multilateral sanctions. As a result, state and local sanctions are not only ineffectual but, because they confuse the U.S. position, they also hinder the efforts of national officials to build the coalitions necessary for effective embargoes.

A further way that state sanctions or any potential departure from the federal position dissipates the effectiveness of the United States is by weakening the bargaining power of the United States during negotiations, especially international trade negotiations. The possibility

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President's ability to send a clear and unified message to the rest of the world").

17 See Richard N. Haass, Economic Sanctions & American Diplomacy 200-01, 206-07 (1998); Economic Sanctions and U.S. Policy Interests: Hearing Before the House Comm. on Int'l Relations, 105th Cong. 10 (1998) (statement of Stuart Eizenstat, Undersecretary for Economics, Business and Agricultural Affairs, State Dep't); Marchick, supra note 8.

of inconsistent state and local actions creates questions about the ability of the federal representatives to commit the United States as a single market. U.S. negotiators would not receive the other side's best offer if the foreign state needed to reserve potential additional concessions for discussions with officials of U.S. states and localities. Centralizing authority over U.S. foreign policy at the national level enhances our influence and the weight of our international role.

The Former U.S. Government Officials acknowledge that achieving uniformity and consistency within the national government of the United States on matters of foreign policy is an ideal that is not always achieved. The President is not always able to ensure harmony among all senior Executive Branch officials, much less all Members of Congress. To some extent, the same problems of confusion and dilution occur within the federal government itself. Nonetheless, that problem differs in several ways from the problems state foreign policy efforts cause. First, the President exercises control over the Executive Branch, but the states do not control the actions of other states. Second, foreign countries generally understand and accept that the United States, as well as some other nations, have systems of government with different branches at the national level that play a role in determining foreign policy. Foreign officials have more difficulty understanding and accepting that subnational units are able to play an independent role in international affairs. Third, state and local action in the international field would immeasurably compound the problem because of the large number of state and local governments that might wish to take some action, and possibly differing actions, in any particular case.

C. State and Local Trade Sanctions Interfere with U.S. Foreign Policy Because They Are Adopted Without the Full Range of Information Available to the National Government.

State and local trade sanctions interfere with national foreign policy because state officials lack sufficient information to make informed judgments about the appropriate policy. Making effective judgments about relations with other countries is a complex and delicate task requiring a broad array of information on many security, political, economic, and social issues in many different countries. Justice Sutherland in *Curtiss-Wright* referred to the "vast external realm, with its important, complicated, delicate and manifold problems."[18] The federal government has a large foreign policy and intelligence-gathering apparatus, including the Departments of State, Defense, Commerce, and Energy, the Office of the U.S. Trade Representative, the National Security Agency, and the Central Intelligence Agency, to provide the information.

Settling on a foreign policy position also requires taking into account the interests of the entire United States. It requires consultation with congressional committees and leadership and the evaluation of competing interests within the United States.

State and local decisionmakers do not have access to this full range of information and necessarily make foreign policy judgments that are less than fully informed. They also lack a national perspective and naturally pursue their own local interests at the expense of other states and the nation.[19] As a result, states and localities take actions in the

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[18] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[19] David Schmahmann & James Finch, "The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)," 30 Vand. J. Transnat'l L. 175, 205 (1997) ("Local actions may be intemperate and not informed by larger, national policy issues.").

foreign policy field that are different from and inconsistent with those preferred by federal officials. Only the federal government is equipped and informed to choose policies in the interests of the nation as a whole.

CONCLUSION

For all of these reasons, the Former U.S. Government Officials believe that state and local trade sanctions and similar international ventures materially harm the conduct of U.S. foreign relations. The United States could find no surer way of dividing and diminishing its effectiveness and influence in world affairs than by authorizing each state and local government to decide for itself the terms on which it will conduct relations with foreign countries. The Former U.S. Government Officials therefore request that the Court affirm the Court of Appeals for the First Circuit and hold the Massachusetts Burma Law unconstitutional.

Respectfully submitted,

ANDREW N. VOLLMER
CAROL J. BANTA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
202-663-6000

MARTIN S. KAUFMAN
Counsel of Record
EDWIN L. LEWIS, III
ATLANTIC LEGAL FOUNDATION
205 East 42d Street
New York, New York 10017
212-573-1960

February 2000

Counsel for Amici Curiae

APPENDIX

APPENDIX

BIOGRAPHICAL INFORMATION ABOUT EACH OF THE AMICI CURIAE

James A. Baker, III served as Secretary of State from 1989-1992. Before that, he was Secretary of the Treasury from 1985-1988 and Undersecretary of Commerce from 1975-1976. He also served as chief of staff to President Reagan (1981-1985) and President Bush (1992-1993). He is the recipient of the Presidential Medal of Freedom (1991), the Woodrow Wilson Award, and many other awards for his distinguished public service.

Griffin B. Bell was Attorney General of the United States from 1977 to 1979 and a judge of the United States Court of Appeals for the Fifth Circuit from 1961 to 1976. He was also Chairman of the Madrid Conference on Security and Cooperation in Europe (1980).

Nicholas F. Brady served as Secretary of the Treasury from 1988 to 1993. He was also United States Senator from New Jersey.

William E. Brock was Secretary of Labor from 1985 to 1987 and U.S. Trade Representative from 1981 to 1985. He served as United States Senator from Tennessee (1971-1977) and a Member of the House of Representatives (1963-1970).

Frank C. Carlucci served as Secretary of Defense from 1987 to 1989. He also served as National Security Advisor (1987), Deputy Secretary of Defense (1981-1982), Deputy Director of Central Intelligence (1978-1981), Ambassador to Portugal (1975-1978), Undersecretary of the Department

of Health, Education and Welfare (1972-1974), and Deputy Director and Associate Director of the Office of Management and Budget (1971-1972). He served as a Foreign Service Officer in various posts from 1956-1978. He is the recipient of numerous awards for distinguished service in the defense and intelligence services of the United States.

Richard B. Cheney was Secretary of Defense from 1989 to 1993. Before that, he served six terms as a member of the House of Representatives from Wyoming.

Frederick B. Dent served as Secretary of Commerce from 1973 to 1975. He was Ambassador and Special Representative for Trade Negotiations from 1975 to 1977.

Lawrence S. Eagleburger was Secretary of State from 1992 to 1993. He served as Deputy Secretary of State from 1989 to 1992 and as Under Secretary of State for Political Affairs from 1982 to 1984. From 1973 to 1975 he was Deputy National Security Advisor. He also served in numerous diplomatic posts, including Ambassador to Yugoslavia from 1977 to 1981.

Gerald R. Ford was the thirty-eighth President of the United States. He also served as Vice President of the United States. He was a Member of Congress for 26 years (1949-1974), serving as Minority Leader of the House of Representatives for 10 years (1965-1974).

Barbara Hackman Franklin served as Secretary of Commerce from 1992 to 1993. She also served as Vice Chair of the Consumer Products Safety Commission from 1973 to 1979.

Sam M. Gibbons served as a member of the United States House of Representatives from Florida for 34 years, from 1962 to 1996. He was Chairman of the House Ways and Means Committee and its Subcommittee on Trade. He

was also U.S. Advisor to the General Agreement on Tariffs and Trade and the World Trade Organization. Congressman Gibbons was a primary advocate and sponsor of every major international trade law enacted during his tenure in Congress. He led numerous interparliamentary delegations throughout Europe, Latin America, the Middle East and Asia on issues of trade and economics.

Alexander M. Haig, Jr. served as Secretary of State from 1981 to 1982. He was Chief of Staff in the White House from 1973 to 1974. His distinguished military career included service as Supreme Allied Commander Europe (1974-1979) and vice chief of staff of the United States Army (1973). He is the recipient of numerous awards and commendations.

Lee H. Hamilton was a Member of the House of Representatives from 1965 to 1999. He served as Chairman of the House Foreign Affairs Committee and the House Intelligence Committee, was a member of the Joint Economics Committee, and was ranking minority member of the House Committee on International Relations. He is director of the Woodrow Wilson Center for International Scholars.

Carla A. Hills served as United States Trade Representative from 1989 to 1993. She served as Secretary of the Department of Housing and Urban Development from 1975 to 1977 and as Assistant Attorney General in charge of the Civil Division, United States Department of Justice from 1974 to 1975. She is the co-author of treatises on federal civil practice and antitrust law.

Juanita M. Kreps was Secretary of Commerce from 1977 to 1979. She is James Duke Professor Emeritus of Economics at Duke University, the author of a treatise on economics, and author, co-author, or editor of numerous monographs on various aspects of economics.

Melvin R. Laird was Secretary of Defense from 1969 to 1973. He was also counsellor to the President from 1973 to 1974. He was a member of the House of Representatives from Wisconsin for 16 years and a member of the Wisconsin State Senate for six years. He is the author of a treatise on American strategic policy. He is recipient of numerous awards, including the French Legion of Honor and the Albert Lasker medical award. He was awarded the Presidential Medal of Freedom in 1974.

Robert S. McNamara was Secretary of Defense from 1961 to 1968 and President of the World Bank from 1968 to 1981. Before entering public service, he was president of Ford Motor Company. He is the author of a book on international security issues and another on international economic development.

Edwin Meese, III was Attorney General of the United States from 1985 to 1988. He was counsellor to the President from 1981 to 1985. From 1969 to 1975, he was chief of staff for the Governor of California.

G. William Miller was Secretary of the Treasury from August 1979 to January 1981 and previously was Chairman of the Board of Governors of the Federal Reserve System from March 1978 to August 1979. Before his government service, he was Chairman and Chief Executive Officer of Textron Inc.

Leon E. Panetta served as White House chief of staff from 1994 to 1997 and as director of the Office of Management and Budget from 1993 to 1994. He was a member of the House of Representatives from 1977 to 1993, serving as Chairman of the House Budget Committee.

William J. Perry was Secretary of Defense from 1994 to 1997, Deputy Secretary of Defense from 1993 to 1994,

and Under Secretary of Defense for Research and Engineering from 1977 to 1981. He is a professor of engineering, economic systems, and operations research at Stanford University and was the co-director of the Stanford University Center for International Security and Arms Control from 1989 to 1993. He is the recipient of numerous awards for public service, including, in 1997, the Presidential Medal of Freedom.

Peter G. Peterson served as Assistant to the President for International Economic Affairs from 1971 to 1972 and Secretary of Commerce from 1972 to 1973. He is currently Chairman of the Board of the Federal Reserve Bank of New York, Chairman of the Council on Foreign Relations, and Chairman of the Institute for International Economics. He has been the CEO of a major industrial company and a major investment bank. He is the author of several works on economics and public policy.

Donald H. Rumsfeld served as Secretary of Defense from 1975 to 1977, as White House Chief of Staff from 1974-1975, as U.S. Ambassador to NATO from 1973 to 1974, as counsellor to the President and director of the economic stabilization program from 1971 to 1972, and as Director of the Office of Equal Opportunity from 1969 to 1970. He served as the President's Special Envoy to the Middle East from 1983 to 1984. He was a member of the House of Representatives from Illinois for eight years. He received the Presidential Medal of Freedom in 1977 and has also been awarded numerous other honors for his public service in the fields of defense and foreign policy.

Brent Scowcroft was National Security Advisor to the President from 1975 to 1977 and from 1989 to 1993 and served in numerous field and senior staff positions in the United States Department of Defense. He also served as a military attaché, taught political science at the Air Force

Academy, and taught at the National War College. He retired as a lieutenant general in the United States Air Force. He received numerous military honors and was awarded the Presidential Medal of Freedom in 1991.

George P. Shultz was Secretary of State from 1982 to 1989. From 1969 to 1970, he served as Secretary of Labor; from 1970 to 1972, he was Director of the Office of Management and Budget, and from 1972 to 1974 he was Secretary of the Treasury. He has also served as Chairman of the President's Council on Economic Policy, negotiated a series of trade protocols with the former Soviet Union and was the chief U.S. representative at the Tokyo Round of negotiations on the General Agreement on Tariffs and Trade. He is currently Distinguished Fellow at the Hoover Institution at Stanford University. He is the author of several books on diplomacy, economic policy, labor policy, labor markets and labor economics, and business management. He was awarded the Presidential Medal of Freedom in 1989.

William E. Simon served as Secretary of the Treasury from 1974 to 1977, Deputy Secretary of the Treasury from 1972 to 1974, and simultaneously as Director of the Federal Energy Office (predecessor of the Department of Energy) from 1973 to 1974. He also served as Chairman of the President's Economic Policy Board and Chairman of the U.S.-Saudi and U.S.-Israel Commissions on Economic Development. He also served as the U.S. governor of the International Monetary Fund and the World Bank.

Robert S. Strauss was U.S. Ambassador to the Soviet Union and Russia from 1991 to 1992. He served as Special Trade Representative from 1977 to 1979 in connection with the Tokyo Round of Multilateral Trade Negotiations. In 1979, he represented President Carter in the Middle East

Peace Negotiations. In 1981, he received the Presidential Medal of Freedom.

Clayton Yeutter served as United States Trade Representative from 1985-1988, Secretary of Agriculture from 1989-1991, and Counselor to the President in 1992. He also served as Assistant Secretary of Agriculture for International Affairs and Commodity Programs and as Deputy Special Trade Representative in the 1970s.

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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, State Purchasing Agent,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE INDUSTRY COALITION ON TECHNOLOGY TRANSFER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ERIC L. HIRSCHHORN
Counsel of Record
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700

TERENCE MURPHY
CHARLES A. WEBER
MURPHY & WEBER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 833-9211

Counsel for Amicus Curiae

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE INDUSTRY COALITION ON TECHNOLOGY TRANSFER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT[1]

The Constitution as well as the inherent character of national sovereignty authorize the federal government to

[1] Pursuant to Supreme Court Rule 37.3, *amicus* has received consent to file this brief from counsel for the petitioners and the respondent. The original letters of consent have been filed with the Clerk of this Court. No part of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of the brief.

regulate political and commercial relations with foreign nations. In the exercise of this authority, Congress enacted in 1996 a statute that imposed certain sanctions against the Union of Myanmar, formerly known as Burma [2] (the "Federal Burma Law"). Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-121, 3009-166 to 3009-167 (1996). The Federal Burma Law restricts certain new investment in Burma by "United States persons" while expressly *not* restricting most commerce between the United States and Burma in goods, technology, and services.

In the face of the federal government's authority in the fields of foreign affairs and foreign commerce, and in direct contradiction to the Federal Burma Law, Massachusetts has enacted a statute (the "Massachusetts Burma Law") penalizing American companies trading with Burma that wish to sell goods or services to Massachusetts. Appendix to Petition for Writ of Certiorari (Pet. App.) 88-94. The United States Court of Appeals for the First Circuit invalidated the Massachusetts Burma Law on the grounds that it unconstitutionally interferes with the federal government's role in foreign affairs, is preempted by the Federal Burma Law, and violates the dormant commerce power. As *amicus curiae*, the Industry Coalition on Technology Transfer (ICOTT) urges this Court to affirm the judgment of the court of appeals.

INTEREST OF THE *AMICUS CURIAE*

The Industry Coalition on Technology Transfer (ICOTT) was founded in 1983. ICOTT comprises five leading trade associations whose thousands of member companies (the ICOTT Companies) sell sophisticated American goods, technology, and services to customers around the globe. The members of ICOTT are the American Electronics Association (AEA), the American Association of Exporters and Importers (AAEI), the Electronic Industries Alliance (EIA), Semiconductor Equipment and Materials International (SEMI), and the Semiconductor Industry Association (SIA).

[2] For reasons of simplicity and consistency with other documents in this case, we refer to Myanmar throughout this brief by its former name.

The American Electronics Association is the nation's largest high-technology trade group, representing more than three thousand United States-based technology companies. Membership spans the industry product and service spectrum, from semiconductors and software to computers, Internet, and telecommunications systems and services. With eighteen regional United States councils and offices in Brussels, Tokyo, and Beijing, AEA offers a unique global policy grassroots capability and a wide portfolio of valuable business services and products for the high-technology industry. For fifty-six years, AEA has been a major voice of the United States technology community.

The American Association of Exporters and Importers (AAEI) is a national organization based in New York City. The membership of AAEI comprises more than 1100 United States companies that export, import, distribute and manufacture a broad spectrum of high technology and other products, as well as financial and other services. AAEI members conduct operations in all fifty states, export all over the world, employ millions of United States workers, and account for a large majority of United States non-military commercial trade. For more than seventy-five years the promotion of trade between the United States and other nations has been the primary mission of AAEI.

The Electronic Industries Alliance (AEI) is a federation of associations and sectors operating in the most competitive and innovative industry in existence. Comprising more than 2100 members, EIA represents eighty percent of the $550 billion United States electronics industry. EIA's member and sector associations represent telecommunications, consumer electronics, components, government electronics, semiconductor standards, as well as other vital areas of the United States electronics industry.

Semiconductor Equipment and Materials International (SEMI) is an international trade association serving more than 2300 companies participating in the $65 billion semiconductor and flat panel display equipment and materials markets. SEMI is based in Mountain View, California and maintains offices in Austin, Beijing, Boston, Brussels, Hsinchu, Moscow, Seoul, Singapore, Tokyo, and Washington, D.C.

The Semiconductor Industry Association (SIA) is the leading trade association representing the U.S. computer chip industry. SIA member companies account for ninety percent of U.S.-based semiconductor production. The mission of SIA is to provide leadership for United States chip manufacturers on critical issues such as trade, technology, environmental protection, and worker safety.

We live in an increasingly interdependent world. In 1980, United States exports and imports of goods and services amounted to $563 billion. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1999, at 790 (Table No. 1307). By 1998 this figure had more than tripled—to over $2 trillion, *id.*—and it doubtless will continue to increase. The ICOTT Companies' interest in this case flows from their right, as economic units doing business

throughout the United States and under its Constitution, to have their dealings with foreign countries governed by a single foreign policy—that of the federal government.

Permitting conduct on the part of states and localities like that challenged here would play hob with the ability of the ICOTT Companies to compete efficiently in the global marketplace. Indeed, it already has done so. Several leading United States-based multinational corporations that belong to ICOTT member associations have advised that they have been directly inhibited by the Massachusetts Burma Law from engaging in trade that expressly is permitted by the Federal Burma Law. One is a Fortune 50 enterprise that is active worldwide and sells a wide range of high technology products and services to state and local governments throughout the United States. This company has advised ICOTT that it has ceased all trade with Burma so that it can execute the no-trade-with-Burma certifications that are required under the Massachusetts Burma Law, and under similar statutes of other states and localities, as a precondition of doing business with those governments.

To a greater degree than some more traditional areas of economic endeavor, the high technology field is hotly competitive across national boundaries. Subjecting United States high technology companies to a host of state and local laws imposing a plethora of foreign policy and foreign commerce restrictions greatly hampers their ability to compete in the global marketplace.

The ICOTT Companies are concerned about the Massachusetts Burma Law and the sixteen or so similar state and local laws addressing relations with Burma. Of far greater concern, though, is the explosion of state and local legislation—addressing not only Burma but each new instance where a foreign government's policies are

distasteful to some Americans—that inevitably would follow a decision upholding the Massachusetts Burma Law.

For various reasons, including the competitiveness and perceived beneficial influence of American companies, the Federal Burma Law expressly permits trade between the United States and Burma. This reflects "a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there." Alan P. Larson, Assistant Secretary for Economic and Business Affairs, U.S. Dep't of State, *State and Local Sanctions: Remarks to the Council of State Governments*, at 3-4 (Dec. 8, 1998); *see* 142 Cong. Rec. S8751 (daily ed. July 25, 1996) (Sen. Bond) ("U.S. firms are the ones on the ground who can help spread American values"); Roger Thurow, *South Africans Who Fought for Sanctions Now Scrap for Investors*, WALL ST. J., Feb. 11, 2000, at 1.

If the concept of federal control of foreign affairs and foreign commerce means anything, it is that state and local governments cannot unilaterally rewrite the foreign policy of the United States to suit themselves, lest we have not one but a host of different and potentially conflicting foreign policies. Preventing such confusion was an important reason for the adoption of the Constitution.

SUMMARY OF ARGUMENT

Even before the Constitution was adopted, exclusive responsibility for the making of foreign policy and the conduct of foreign affairs was vested in the national government. The United States must be able to speak with one voice in matters of foreign policy and foreign commerce, without interference from or distraction by the

actions of states or localities. Our Constitution leaves no room for other voices. The Massachusetts Burma Law impermissibly invades the foreign policy sphere that is reserved exclusively to the federal government.

Moreover, for deliberate foreign policy reasons, the Federal Burma Law was carefully drafted to permit trade in goods, services, and technology between the United States and Burma. The Massachusetts Burma Law penalizes companies that engage in such trade and thus stands as an obstacle to the Federal Burma Law. It accordingly is preempted.

Finally, the Massachusetts Burma Law violates the dormant commerce power. Massachusetts is acting as a regulator rather than a market participant because its statute regulates activity outside the Commonwealth and outside the market in which it is participating. The Massachusetts Burma Law discriminates against those engaging in foreign commerce. Even absent the fact that trade with Burma expressly is permitted by the Federal Burma Law, the discrimination wrought by the Massachusetts Burma Law violates the dormant commerce power.

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW IMPERMISSIBLY INVADES THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY OVER FOREIGN AFFAIRS.

A. The Foreign Affairs Power of the Federal Government Excludes State and Local Activities Such as That Represented by the Massachusetts Burma Law.

Our nation's foreign policy and foreign affairs are "matters which the Constitution entrusts solely to the Federal Government," *Zschernig v. Miller*, 389 U.S. 429,

436 (1968), and the federal government's authority in this area is "not shared by the states [but] vested in the national government, exclusively," *United States v. Pink*, 315 U.S. 203, 233 (1942). A state statute that engages the state in foreign affairs (e.g., by judging the policies of foreign governments) is an impermissible intrusion into the federal sphere because of its "great potential for disruption or embarrassment," *Zschernig*, 389 U.S. at 435, its "persistent and subtle" effect upon our international relations, *id.* at 440, and its "impair[ment]" of "the effective exercise of the Nation's foreign policy." *Id.*; *see New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977) (holding that states "may not launch inquiries into the righteousness of foreign law"); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (suggesting that the line of impermissible intrusion into the federal sphere is crossed where a state law targets, or is motivated by disapproval of, particular foreign nations).

In the instant case Massachusetts and the federal government happen to agree that the existing government of Burma is undemocratic and that, in the words of the court of appeals, "human rights conditions in Burma are deplorable." Pet. App. 5. But if individual states and localities can have their own foreign policies, there is significant risk that such policies will conflict with the foreign policy of the United States.

In a significant current example, the federal government has taken no position in the longtime dispute over Kashmir between India and Pakistan—two strategically vital countries that have difficult relations with one another but good relations with the United States. Indeed, in the half century since British India was partitioned, the United States carefully has avoided any hint of

favoritism while urging the parties to seek a peaceful solution of their conflicting claims. The federal government also deals regularly with these two important nations on such other sensitive issues as their recent nuclear weapons tests, trade with third countries that the United States seeks to isolate, and trade with United States enterprises. Imagine that the New York legislature decided that Pakistan is in the right and prohibited New York state agencies from purchasing from companies that do business in India. Meanwhile, the California legislature, viewing the matter differently, decided that India is in the right and forbade California agencies to buy from companies that do business in Pakistan. The possibilities for embarrassment and confusion in our national policy toward these nations are obvious and substantial. One readily can imagine the occurrence of similar schisms between the federal government and one or more states, or between different states, with respect to Chechnya's current efforts to break away from Russia—as to which the United States, while expressing concern, has taken no action favoring either side—or the campaign of Quebec separatists to free their province from Canada.

Massachusetts expressly intended to use its law to change the policy of Burma. Pet. App. 9 ("foreign policy" measure seeking "free democratic elections in Burma"). Permitting such intervention by states and localities interferes with the ability of the United States to speak with one voice on issues of foreign policy. The court of appeals reviewed the constitutional provisions relating to foreign affairs in reaching its conclusion that the Massachusetts Burma Law improperly infringes upon federal authority. Pet. App. 14-18. But even before the adoption of the Constitution—and from the moment the colonies dissolved their connection with Great Britain—the foreign affairs power was vested in the *united* states

rather than in the individual states. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936). Hence "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution," as such powers are "necessary concomitants of nationality." *Id.* at 318.

This concept also "forms an obvious and essential branch of the federal administration" under the Constitution, for "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST No. 42, at 264 (James Madison) (New Amer. Library 1961). Madison expressly included foreign commerce among the areas that were to be—and had to be—regulated solely by the federal government. *Id.* Thus the Massachusetts Burma Law represents an unconstitutional invasion of the federal government's power to conduct foreign affairs.

B. The Massachusetts Burma Law Is Preempted by the Federal Burma Law.

In addition to being invalid because it infringes upon the federal government's foreign affairs powers and responsibilities, the Massachusetts Burma Law is preempted by the Federal Burma Law. The latter statute represents the federal government's measured response to the policies and conduct of the Burmese government. The Federal Burma Law imposed several sanctions immediately while holding in reserve a prohibition upon "new investment" in Burma and expressly excluding from that prohibition sales and purchases of goods, services, and technology. What is a manufacturer to do when the federal government thus encourages (or at least permits) it to trade with a foreign nation but individual states announce that such actions will disqualify the company from selling to such states? And what message does Massachusetts's de

facto ban upon trade with Burma, where the federal government has decided *not* to ban such trade, convey to the government whose conduct the United States seeks to influence?

This Court has noted "the delicate problems of foreign relations," *United States v. Pink*, 315 U.S. 203, 229 (1942), and the fact that a state policy must yield when it "would collide with and subtract from the Federal policy," *id.* at 231. The Massachusetts Burma Law's prohibition on trade with Burma collides with and subtracts from the express federal policy of *permitting* such trade. "If state action could defeat or alter our foreign policy, serious consequences might ensue." *Id.* at 232. For that reason "[n]o state can rewrite our foreign policy to conform to its own domestic policies." *Id.* at 233. That Congress deliberately decided to steer a middle ground (i.e., by restricting investment but not trade) is a significant factor in finding that the state is precluded from establishing its own, different scheme regulating the same area. *Hines v. Davidowitz*, 312 U.S. 52 (1941). When concurrent federal and state legislation exist "in a field that affects international relations," any "concurrent state power that may exist is restricted to the *narrowest of limits.*" *Id.* at 68 (emphasis added). Moreover, where federal legislation "touches on a field," such as foreign relations, "in which the federal interest is . . . dominant[,] . . . the federal system will be assumed to preclude state laws on the same subject." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see Hines*, 312 U.S. at 67 (holding that a state law is preempted when "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

The text of the Federal Burma Law makes plain that Congress engaged in a thoughtful effort to strike a deli-

cate balance between leaving Burma's conduct untouched and isolating Burma from the United States. That was a classic—and appropriate—exercise of the foreign affairs power that the Constitution vests exclusively in our national government.

The Massachusetts Burma Law upsets the balance struck by Congress by discouraging and punishing the same activity (trade in goods, technology, and services) that Congress expressly decided to permit. The Massachusetts enactment stands very much as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *See Hines*, 312 U.S. at 67. For this reason, among others, the Massachusetts Burma Law is preempted by the Federal Burma Law.

Massachusetts claims that this merely is an example of a state law's imposing liability over and above that imposed by federal law. Pet. Brief at 23-24. But that is impermissible where the state seeks to conduct its own foreign policy by deciding that the balance carefully struck by the federal government is unsatisfactory.

II. THE MASSACHUSETTS BURMA LAW VIOLATES THE DORMANT COMMERCE POWER.

A. Massachusetts Is Not Acting as a Market Participant and Hence Is Subject to the Dormant Commerce Power.

The Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, plays a dual role in the federal system. In addition to authorizing affirmative congressional action in respect of interstate and foreign commerce, it constrains the states from taking action that threatens the values the clause was intended to serve. *H.P. Hood & Sons, Inc. v. Du-Mond*, 336 U.S. 525 (1949). James Madison considered

this "negative" or "dormant" aspect of the clause more important than its positive grant of power to Congress. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).

Massachusetts seeks to avoid its violation of the dormant commerce power by contending that it merely is acting as a "market participant" and implying that state purchasing ipso facto is within the market participant exception to the dormant commerce power. Pet. Brief at 25-36.[3] The Massachusetts Burma Law does precisely what this Court has held to constitute regulation rather than market participation, namely imposing, in the guise of market participation, a restriction that extends beyond the market in which the state is participating and seeks to control behavior (namely that of the Burmese government) that bears no relation to the state's market participation. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

In 1986 this Court held that a Wisconsin statute prohibiting state agencies from purchasing from companies that had violated the National Labor Relations Act (NLRA) was a regulatory—and not proprietary—action and therefore preempted by the NLRA. *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986). That is precisely what the Massachusetts Burma Law does, making it a regulatory act rather than the act of a market participant.

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[3] Massachusetts concedes, as it must, that this Court has yet to extend the market participant doctrine to the *foreign* commerce context, Pet. Brief at 26 (citing *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980)), and fails to mention that the Court has declined to extend the market participant exception to such other restrictions on state authority as the Privileges and Immunities Clause, *United Bldg. & Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984).

B. The Massachusetts Burma Law Discriminates Against Foreign Commerce and Hence Cannot Stand.

Even where the federal government has taken no action in a particular area, there is a "virtual *per se* rule of invalidity" where a state discriminates against interstate or foreign commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[4] By this measure as well as those discussed above, the Massachusetts Burma Law is unconstitutional. A vendor who sells his wares only in Massachusetts is not penalized, while a vendor who would sell to Massachusetts as well as in Burma suffers a state-mandated ten percent addition to its bids for sales to Massachusetts state agencies. *See Healy v. Beer Institute*, 491 U.S. 324, 340-41 (1989) (noting that state laws that discriminate against interstate commerce consistently have been held to violate the dormant commerce power).

Nor is the Massachusetts Burma Law saved by the fact that the restraint upon doing business with Burma is indirect. This Court pointed out only recently that just as a state may not tax imported goods without taxing goods made in the state, it may not tax real estate used to store imported goods without taxing real estate used to store goods made in the state. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997). Similarly, Massachusetts may not directly forbid its private citizens, or its prospective private sector vendors, from trading with Burma. Massachusetts accordingly

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[4] It is a "virtual" per se rule of invalidity because facially discriminatory state regulation can survive Commerce Clause analysis in the rare instance where it passes "strict scrutiny" requiring proof that no less discriminatory alternatives exist. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). Massachusetts has made no such showing here.

may not do so indirectly by penalizing those who engage in such conduct. That the Massachusetts Burma Law nominally addresses only sales to Massachusetts state agencies is irrelevant because its practical effect is to control commerce elsewhere—namely, between Burma and potential vendors to Massachusetts. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582-83 (1986).

Finally, the expression of United States policy reflected in the Federal Burma Law is sufficient to trigger the "one voice" criterion of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). The federal government has a clear, measured, carefully parsed, and formally articulated policy of prohibiting certain activities (foreign aid and new investment) in respect of Burma while permitting others—specifically, trade—to proceed unhindered. The Massachusetts Burma Law punishes precisely the activity the federal government has decided to permit.

Thus the Massachusetts Burma Law is not within the market participant exception to the dormant commerce power and the law violates that restraint upon the states.

CONCLUSION

For the reasons set forth above, in the decisions below, in the respondent's brief, and in the briefs of other *amici* filed in support of the respondent, the judgment of the court of appeals, Pet. App. 74, should be affirmed.

Respectfully submitted,

ERIC L. HIRSCHHORN
Counsel of Record
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700

TERENCE MURPHY
CHARLES A. WEBER
MURPHY & WEBER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 833-9211

Counsel for Amicus Curiae

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BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

DANIEL J. POPEO
R. SHAWN GUNNARSON
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

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QUESTIONS PRESENTED

1. Whether the First Circuit correctly held that the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G–22M—which was undisputably enacted to condemn the Union of Myanmar and to influence the conduct of its government—unconstitutionally infringes upon the federal government's exclusive authority to regulate foreign affairs.

2. Whether the Massachusetts Burma Law, which discriminates against foreign commerce, violates the "speak-with-one-voice" principle, and seeks to regulate extraterritorial activity in a foreign nation, violates the Foreign Commerce Clause.

3. Whether the Massachusetts Burma Law, which upsets the delicate balance established by federal Myanmar sanctions, is preempted by federal law.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the nation. WLF regularly appears in legal proceedings before federal and state courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this Court in cases where the conduct of foreign affairs or where foreign affairs considerations figured prominently. *See, e.g., Perpich* v. *U.S. Dep't of Defense*, 496 U.S. 334 (1990). WLF submits this brief in support of Respondent and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

SUMMARY OF ARGUMENT

The Massachusetts Burma Law unconstitutionally trenches on the federal government's predominant authority over this Nation's foreign affairs. Contrary to the Commonwealth's arguments, this Court can and should squarely address that claim.

The Constitution establishes a structure, a framework of government, that renders the question of congressional consent irrelevant. Congress cannot consent to State laws that encroach on its constitutionally delegated powers any more than States may consent to laws that encroach on their constitutionally reserved powers. Moreover, it has long been understood that the framework of government established by the Constitution enjoys two protections. Congress may affirmatively enact laws that preempt conflicting State laws, and this Court may, in the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

sound exercise of judicial review, determine that a State or federal law transgresses the boundaries laid down by the Constitution. For these reasons, the Court must squarely address whether the Massachusetts Burma Law unlawfully exercises the federal government's authority over foreign affairs. The answer is, it does.

The Constitution delegates predominant authority over foreign affairs to the federal government, as text, evidence of original understanding, and this Court's decisions attest. Although States may exercise their reserved powers in a manner that happens to create an effect abroad, they may not conduct foreign affairs. To distinguish between these two circumstances, we propose a series of questions aimed at identifying when a State has conducted foreign affairs. Tested by that inquiry, the Massachusetts Burma Law qualifies as an instrument of foreign affairs. Because it does, this Court should declare the law unconstitutional.

ARGUMENT

The U.S. Court of Appeals for the First Circuit held that the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G–22M and 40F½, "interferes with the foreign affairs power of the federal government and is thus unconstitutional." *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 45 (1st Cir. 1999). Massachusetts has asked this Court to reverse that decision based on at least three reasons. First, it argues that State procurement laws fall within the State's broad authority "'to determine those with whom it will deal,'" Br. Pet. 27 (quoting *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940)), "'free[] from federal constraints.'" *Id.* (quoting *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 (1980). Second, Massachusetts argues

that "Congress has implicitly permitted state and local selective purchasing laws on Burma." *Id.* at 21. Third, it urges this Court to eschew judicial review on the ground that policing "constitutional claims against divestment and selective purchasing laws . . . will sap the lawmaking powers of the States and unduly enlarge the role of the courts." *Id.* at 46. We disagree. To explain why, we begin by covering familiar ground: the chief structural features of the Constitution.

I. CONGRESS MAY NOT CONSENT TO STATE ENCROACHMENTS ON ITS CONSTITUTIONALLY DELEGATED POWERS

James Madison described our form of government with brilliant brevity. "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments." THE FEDERALIST NO. 51, at 351 (Jacob E. Cooke ed., 1961). Moreover, Madison assured the American people that the federal government would remain limited, both because its powers are enumerated and because those powers are few in number and readily distinguishable from the powers reserved to the States.

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend

> to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 313. Counterbalancing the limits placed on the federal government is the Supremacy Clause, which ensures that "[t]he general government, though limited as to its objects, is supreme with respect to those objects." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 381 (1821).

Massachusetts has asserted that the Burma Law ought to be regarded as constitutional, simply because Congress has not expressly preempted it and instead has "implicitly permitted state and local selective purchasing laws on Burma." Br. Pet. 21. That assertion flies in the face of this Court's teaching that the form of government created by the Constitution is independent of political arrangements between Congress and the States. In *New York* v. *United States*, 505 U.S. 144 (1992), the Court addressed a Tenth Amendment challenge to the take title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842, *codified at* U.S.C. §§ 2021b *et seq.* This provision required States to enact legislation in a manner dictated by Congress or "tak[e] title to and possession of the low level radioactive waste generated within their borders and becom[e] liable for all damages waste generators suffer as a result of the States' failure to do so promptly." *Id.* at 174–75. The United States argued that the provision "embodies . . . a compromise to which New York was a willing participant, and from which New York has reaped much benefit." 505 U.S. at 181. It then posed the following question: "how can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?" *Id.*

For its answer the Court returned to first principles:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

Id. Because it understood that the federal structure stands on a solid foundation of popular sovereignty, the Court understandably concluded that the States' consent to the take title provision was constitutionally irrelevant. "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *Id.* at 182.

The Court drew support for this conclusion from two sources. It first relied on its separation of powers decisions, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and *INS* v. *Chadha*, 462 U.S. 919 (1983), which held that "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." 505 U.S. at 182. The Court also pointed out that "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests." *Id.* In *New York* those incentives gave both state and federal officials every *political* reason to avoid becoming accountable for the unpopular decision of where to place radioactive waste disposal sites. Because the "[t]he interests of public officials thus may not coincide with the Constitution's intergovernmental allocation

of authority . . . federalism is hardly being advanced." *Id.* at 183.

Massachusetts has asked this Court a question that mirrors the question addressed in *New York*. In effect, it asks how a state statute can be found an unconstitutional infringement of federal authority when Congress consented to the statute's enactment. *See* Br. Pet. 21. However, *New York* teaches that the Constitution establishes a permanent structure of government, not a transient set of political arrangements. And that structure is no less undermined when States exercise powers delegated to the federal government than when the federal government exercises powers reserved to the States. *See Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). For that reason, congressional consent, express or implied, has no bearing on the constitutional question of whether the Massachusetts Burma Law usurps the national government's predominant authority over foreign affairs.

II. JUDICIAL REVIEW IS ENTIRELY APPROPRIATE TO RESOLVE QUESTIONS ARISING FROM THE CONSTITUTIONAL DISTRIBUTION OF FEDERAL AND STATE POWERS

Massachusetts has also asserted that the Court ought to avoid casting itself in the role of "'overseer of our government,'" Pet. 46 (quoting *Barclays Bank* v. *Franchise Tax Bd.*, 512 U.S. 298, 330 (1994)), by refusing to open the door to "constitutional claims against divestment and selective purchasing laws." *Id.* It is unclear exactly what Massachusetts means by this. Perhaps it means that the Court should avoid deciding whether the Burma Law infringes on the federal government's foreign affairs power, simply

because it involves the topic of foreign affairs. If so, the Court has already rejected this argument, emphasizing that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr*, 369 U.S. 186 (1962); *see also Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U.S. 221, 229–30 (1986). To distinguish political questions from questions fit for judicial resolution, the Court has looked beyond the subject matter to "the history of its management by the political branches," 369 U.S. at 211, "its susceptibility to judicial handling in the light of its nature and posture in the specific case," *id.*, and "the possible consequences of judicial action." *Id.* at 211–12. For example, the Court explained that while it would avoid asking whether a treaty has been terminated, it would confidently address whether a treaty preempts an allegedly conflicting State law. *Id.* at 212.

On these terms the question before the Court presents no bona fide political question at all. Massachusetts has simply confused the term "political question" with what is undoubtedly "a question having political overtones." Far from calling on the Court to evaluate the merits of a foreign policy matter, this case demonstrates that it is possible to address the question presented without inquiring into the political conditions of Myanmar. *See National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 45 (1st Cir. 1999). To answer the question before it, this Court need only do what it has done from the very beginning: "the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled." *See McCulloch* v. *Maryland*, 17 U.S. 316, 405 (1819).

Perhaps Massachusetts's argument is that the Court should avoid deciding questions centering on the constitutional distribution of powers to the federal government and the States. If so, the Commonwealth is gravely mistaken. Disputes regarding the distribution of power between the federal government and the States form an especially appropriate object for the exercise of judicial review. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1375 (1997). Certainly that was the view of the Court in *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858). There the Wisconsin Supreme Court, on a petition for habeas corpus, freed a prisoner charged by a federal commissioner with violating the Fugitive Slave Act and declared the Act unconstitutional. Then the court ordered the man released again after he was convicted in federal court. *Id.* at 507–09. This Court held that State courts lack the power to determine the validity of a federal order committing a person to prison. *Id.* at 523. Chief Justice Taney, writing for a unanimous Court, took pains to emphasize the importance of judicial review for the preservation of the constitutional structure. In describing the reasons for the delegation of powers to federal courts under Article III, Justice Taney wrote, "This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government."[2] *Id.* at 520.

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[2] Daniel Webster, speaking during the great Webster-Hayne debates, expressed much the same thought:

> No State law is to be valid, which comes in conflict with the Constitution, or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the

(continued...)

For these reasons, the Court should decline Massachusetts's invitation to eschew the exercise of judicial review. *See* Br. Pet. 46. Instead the Court should straightforwardly address whether the Massachusetts Burma Law usurps the federal government's constitutional authority over foreign affairs. We urge the Court to conclude that it does. Constitutional text, history, and this Court's decisional law demonstrate that the federal government holds predominant authority over foreign affairs.

III. THE CONSTITUTION DELEGATES PREDOMINANT AUTHORITY OVER FOREIGN AFFAIRS TO THE FEDERAL GOVERNMENT

A. Text

The words of the Constitution delegate vast powers over foreign affairs to the federal government. Congress holds the power to establish tariffs, U.S. CONST. art. I, § 8, cl. 1, "provide for the common Defence," *id.*, regulate foreign commerce, *id.* at art. I, § 8, cl. 3, regulate naturalization, *id.* at art. I, § 8, cl. 4, regulate the value of foreign currency, *id.* at

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[2] (...continued)

> Constitution itself decides also by declaring "that the judicial power shall extend to all cases arising under the Constitution and laws of the United States." These two provisions, sir, [the Supremacy Clause and Article III, § 2] cover the whole ground. They are in truth the keystone of the arch. With these it is a Constitution; without them it is a Confederacy.

Daniel Webster, Reply to Hayne, Jan. 26th, 1830, *reprinted in* 10 THE WORLD'S BEST ORATIONS 3820 (David J. Brewer ed., 1899). Tocqueville agreed, describing this Court as "a unique tribunal one of whose prerogatives was to maintain the division of powers appointed by the Constitution between these rival governments." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 115 (J.P. Mayer ed. & George P. Lawrence trans., 1969).

art. I, § 8, cl. 5, punish naval crimes and violations of international law, *id.* at art. I, § 8, cl. 10, "declare war," *id.* at art. I, § 8, cl. 11, raise and regulate armies and navies, *id.* at art. I, § 8, cls. 12–14, organize and fund the militia, *id.* at art. I, § 8, cls. 15–16, and govern lands purchased for the building of military bases. *Id.* at art. I, § 8, cl. 17. Article II delegates equally impressive authority over foreign affairs to the President, including the power to serve as "Commander in Chief," *id.* at art. II, § 2, make treaties and appoint diplomats, *id.*, receive diplomats and foreign ministers, *id.* at art. II, § 3, and commission military officers. *Id.* Article III delegates to federal courts jurisdiction over cases arising under treaties, *id.* at art. III, § 2, cases affecting foreign diplomats and ministers, *id.*, admiralty and maritime cases, *id.*, and cases between an American citizen and a foreign country or its citizens. *Id.* In addition, occupying most of this Court's original jurisdiction are "cases affecting ambassadors, other public ministers and consuls." *Id.*

As clearly as it delegates this array of powers to the federal government, the Constitution with equal clarity prohibits States from encroaching on many of these powers. Article I, section 10 forbids States to "grant Letters of Marque and Reprisal." *Id.* at art. I, § 10, cl. 1. It also forbids them to do the following without the consent of Congress: "lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws," *id.* at art. I, § 10, cl. 2, "lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* at art. I, § 10, cl. 3.

The text of the Constitution thus confirms that the federal government possesses vast powers to wage war and conclude peace, regulate foreign commerce, adjudicate disputes affecting foreign ministers, and in several other ways to govern the course of the Nation in its relationship to the world. Yet the text alone does not resolve the question presented, because it contains no single clause defining the term "foreign affairs" or "foreign relations."

However, "a fair construction of the whole instrument," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), discloses that the Constitution delegates predominant power over foreign affairs to the federal government. "[A]gainst the landscape of foreign relations as they were conducted at the time of the Founding, the allocation seems decisively to have established a principle of federal exclusivity. War, trade, treaties, and the maintenance of diplomatic relations—arguably the foreign relations of the Founding era consisted of nothing else." Peter J. Spiro, *Role of The States in Foreign Affairs: Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1228–29 (1999). In addition, the lack of a precise constitutional definition of foreign affairs should not be considered a barrier to recognizing foreign affairs as a bona fide category of constitutional interpretation. "Behind the words of the constitutional provisions are postulates which limit and control." *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 322 (1934). It is likewise true that the Constitution nowhere contains the terms "separation of powers," or "federalism," or even "the rule of law," yet like "foreign affairs" they number among the "essential postulates," *id.*, of that document. *See, e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 946 (1983) (separation of powers); *Gregory* v. *Ashcroft*, 501 U.S. 452, 457-59 (1991) (federalism); *In re Winship*, 397 U.S. 358, 384 (1970) (Black, J., dissenting) (the rule of law).

This interpretation of constitutional text is amply supported by evidence of original understanding.

B. Original Understanding

It is a commonplace that defects in the Articles of Confederation led to the forming of "a more perfect Union," U.S. CONST. preamble, under the Constitution. But nowhere is this commonplace more true (or more revealing) than in the field of foreign affairs. "Of all the impulses that drove men like Washington and Hamilton to Philadelphia in 1787, none was stronger than the uncomplicated, patriotic sense of shame at the contempt in which the United States seemed to be held—from Britain at one end of the scale of power to the Barbary states at the other." CLINTON ROSSITER, 1787: THE GRAND CONVENTION 45 (Norton ed., 1987) (1966). Three foreign policy crises had especially profound effects.

The first arose out of the Peace of 1783, which concluded the War of Independence with Great Britain. It entitled both American and British creditors to recover good faith debts "with no lawful impediment," JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 27 (1996), and required Congress to get the states to allow British subjects and American loyalists to recover their confiscated property. *See id.* "Both articles placed Congress in the awkward position of guaranteeing what it lacked the constitutional authority to deliver: the compliance of state legislatures and courts with a national commitment made to a foreign power." *Id.* The British retaliated by keeping their forts in Oswego, Niagra, and Detroit, along the northwestern frontier, in violation of the peace treaty. *See id.*

By 1784, a second crisis erupted when Great Britain closed her home island and West Indies ports

to American shipping. At the same time, British ships entered American ports at will. *See id.* "Lacking authority to regulate interstate or foreign commerce, Congress could neither devise nor impose a uniform set of restrictions on British ships. And this *constitutional* debility in turn diminished the prospects for advancing American trading interests through the negotiation of a satisfactory commercial treaty with Britain . . . ." *Id.* at 26-27.

The third major foreign policy crisis arose when, in April 1784, Spain barred American ships from entering New Orleans and navigating the lower Mississippi River. *See id.* at 27. Because there was effectively no American navy to counter Spain's action, American frontiersmen were cut off from exporting their goods via the Gulf of Mexico. *See id.* This posed a grave threat to the safety of America's western territories. As events then stood, "[s]hould the weakness of the Union force western settlers to accommodate themselves to Spain, control of the regions lying between the Appalachian Mountains and the Mississippi would be lost to the United States." *Id.*

With foreign affairs disasters like these in mind, "the most serious doubts about the adequacy of the Articles of Confederation arose over the inability of Congress to frame and implement satisfactory foreign policies." *Id.* at 26. Yet the reasons why the Articles left the Nation *constitutionally* unable to conduct foreign affairs are far from evident on reading the Articles of Confederation themselves. After all, Article IX granted congress "the sole and exclusive right and power," THE ARTICLES OF CONFEDERATION, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 376, 380 (Donald S. Lutz ed., 1998), over nearly the same range of matters ultimately delegated by the Constitution to the federal govern-

ment, including "determining on peace and war," *id.*, "sending and receiving ambassadors," and "entering into treaties and alliances." *Id.* At the same time, Article VI prohibited the States from, among other things, sending and receiving ambassadors, entering treaties or other international agreements, or engaging in war without congressional consent. *See id.* at 378–79.

For an answer to this puzzle we are indebted to James Madison. As a recent biographer has written, "the Virginian's first and most important contribution to the framing . . . lay in his conclusion that the fundamental flaw of the Confederation was its irredeemably defective structure." LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON & THE FOUNDING OF THE FEDERAL REPUBLIC 116 (1995). Based on an extensive study of ancient and modern confederacies, Madison identified "[e]ncroachments by the States on the federal authority," James Madison, *Vices of the Political System of the United States*, *reprinted in* JAMES MADISON, WRITINGS 69 (Jack N. Rakove ed., 1999), as a key defect of the Articles. As examples of this vice he cited Georgia's war against the Indians, "unlicensed compacts," *id.*, between Virginia and Maryland and Pennsylvania and New Jersey, and the military troops raised and kept by Massachusetts. (Interestingly, two out of three examples reflected encroachments by the States on the Continental Congress's "sole and exclusive," THE ARTICLES OF CONFEDERATION, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 376, 380 (Donald S. Lutz ed., 1998), power over foreign affairs.) As alarming as these events were in themselves, Madison worried more that they disclosed a deep flaw in the constitutional foundation of the Articles. "[R]epetitions may be foreseen in almost every case where any favorite object of a State shall present

a temptation." *Id.* "The inadequacy of this governmental structure was responsible in part for the Constitutional Convention." *New York* v. *United States*, 505 U.S.144, 163 (1992). Thus the crucial point is not so much that America suffered from foreign policy crises under the Articles of Confederation, as it is that those crises prompted the Founders to adopt a new form of government in response. And this close relationship between enhancing the foreign affairs powers of the federal government and guarding against encroachments on that power by the States deeply influenced those who wrote and ratified the Constitution.

On May 29, 1787, Governor Edmund Randolph of Virginia stood in Independence Hall and introduced the Virginia Plan, the basis for the original Constitution. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18–19 (Max Farrand ed., 1966). Among "the defects of the confederation," *id.* at 18, he described, two involved the Nation's conduct of foreign affairs. First, Randolph noted that "the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority. . . . [T]hey could not cause infractions of treaties or of the law of nations, to be punished . . . . [P]articular states might by their conduct provoke war without controul." Second, Randolph observed "that there were many advantages, which the U. S. might acquire, which were not attainable under the confederation—such as . . . counteraction of the commercial regulations of other nations." *Id.* at 19.

Three weeks later, on June 19th, Madison addressed the Convention in opposition to the Virginia Plan's great rival, the New Jersey Plan, which proposed a weaker, more state-centered form of government. *See id.* at 314–22. Madison criticized

that Plan on two pertinent grounds. First, he pointed out that it would not "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars." *Id.* at 316. For, as Madison underscored, "A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole." *Id.* Second, he discerned that the Plan would not "prevent encroachments on the federal authority," *id.*, because it "omitt[ed] a controul over the States as a general defence of the federal prerogatives." *Id.* at 317. Given this and other criticisms, the New Jersey Plan was rejected. *Id.* at 322.

But the Convention also declined to adopt Madison's solution to the problem of State encroachments on federal powers. It flatly rejected the Virginia Plan's proposal giving Congress authority "to negative all laws passed by the several States, contravening in the opinion of the national Legislature the articles of Union." 1 *Id.* at 21. Gouverneur Morris convincingly argued, "A law that ought to be negatived will be set aside in the Judiciary departmt. And if that security should fail; may be repealed by a Nationl. Law." 2 *Id.* at 28. Moments later, in place of Madison's beloved negative on state laws, the Convention adopted the principle of the supremacy of federal law, *see id.* at 28-29, which eventually became embodied in the Supremacy Clause. *Compare id. with* U.S. CONST. art. VI.

The finished document reflected two clear improvements over the Articles of Confederation. First, it delegated sufficient powers to the federal government to effectively conduct the Nation's foreign affairs without relying on the States. Second, it established two defenses against the encroachment

by States on federal power. As Gouverneur Morris had presciently understood, these took the form of two provisions. One was the Supremacy Clause, which implicitly gave Congress the power to affirmatively deny States the authority to act on a matter delegated to the federal government. The other lay in the grant of jurisdiction to federal courts, which carried with it the power to "set aside" State laws at odds with the Constitution itself. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 391 (1819). As Daniel Webster succinctly expressed it, "These two provisions . . . cover the whole ground. They are in truth the keystone of the arch. With these it is a Constitution; without them it is a Confederacy." Daniel Webster, Reply to Hayne, Jan. 26th, 1830, *reprinted in* 10 THE WORLD'S BEST ORATIONS 3820 (David J. Brewer ed., 1899).

The Constitution also boosted the national government's power to control foreign affairs. *The Federalist*, "usually regarded as indicative of the original understanding of the Constitution," *Printz* v. *United States*, 521 U.S. 898, (1997), makes it clear that the Constitution delegates predominant authority over foreign affairs to the federal government. Beginning in *The Federalist* No. 41, Madison analyzed the powers delegated to the federal government, explaining "the sum or quantity of power which [the Constitution] vests in the Government, including the restraints imposed on the States." THE FEDERALIST NO. 41, at 268 (Jacob E. Cooke ed., 1961) (James Madison). He classified delegations of federal power into six categories, only two of which concern us here.

The first Madison labeled "security against foreign danger," under which he included the powers of "declaring war, and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money."

Id. at 269. These he regarded as indispensable powers for a national government. "Security against foreign danger is . . . an avowed and essential object of the American Union. The powers requisite for attaining it, must be effectually confided to the fœderal councils." *Id.*

Madison then discussed the second category of federal powers, "which regulate the intercourse with foreign nations." THE FEDERALIST NO. 42, at 279. Under this heading, Madison included the power "to make treaties; to send and receive Ambassadors, other public Ministers and Consuls; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to regulate foreign commerce . . . ." *Id.* Once again, Madison considered these powers to lie within the exclusive province of the federal government. "This class of powers forms an obvious and essential branch of the fœderal administration. *If we are to be one nation in any respect, it clearly ought to be in respect to other nations.*" *Id.* (emphasis added). Granting the federal government sole authority to define "offences against the law of nations," *id.*, plainly improved on the Articles of Confederation, which, as Madison pointed out, "leave it in the power of any indiscreet member to embroil the confederacy with foreign nations." *Id.* at 280-81.

Madison then distinguished the powers belonging to the federal government from those belonging to the States. State power, he wrote, would "extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 313. Federal power, on the other hand, would operate "principally on external objects, as war, peace, negociation, and foreign commerce." *Id.* Thus it

is clear that Madison regarded "war, peace, negociation, and foreign commerce" as "external objects," *id.*, over which the Constitution delegated predominant (if not exclusive) authority to the federal government.[3]

C. Precedent

This original understanding was confirmed by an unbroken line of this Court's decisions, establishing

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[3] Authoritative nineteenth century students of the Constitution agreed that the document left foreign affairs predominantly in the hands of the federal government. Alongside the *Federalist*, perhaps "the most widely held 'original understanding' of the nature of the Constitution" was expressed by Justice Joseph Story in his *Commentaries*. Ronald D. Rotunda & John E. Nowak, *Introduction* to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES at xxi (Carolina Academic Press 1987) (abridged ed., 1833) [*hereinafter* Story]. Story agreed with Madison that the Constitution reserved to the States no power to conduct foreign affairs.

> The security (as has been justly observed) of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single state. The constitution has wisely both in peace and war, confided the whole subject to the general government. Uniformity is thus secured in all operations, which relate to foreign powers; and an immediate responsibility to the nation on the part of those, for whose conduct the nation is itself responsible.

Id. at 490. Tocqueville agreed, writing that "the federal Constitution put the permanent control of the nation's foreign interests in the hands of the President and the Senate." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 226 (J.P. Mayer ed. & George P. Lawrence trans., 1969). Thomas Cooley, whose work decisively shaped constitutional jurisprudence during the last half of the nineteenth century, wrote that "all international questions belong to the national government." THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 128 (1868). Even the arch states' rights advocate, John Calhoun, recognized the predominance of the federal government in the field of foreign affairs. "In our relation to the rest of the world . . . the States disappear. Divided within, we present the exterior of undivided sovereignty." 29 ANNALS OF CONGRESS 531 (1816).

the principle that the federal government holds predominant authority over the entire field of foreign affairs and that this predominance necessarily denies States such authority except on the margins. *See Hines* v. *Davidowitz*, 312 U.S. 52, 62 (1941). As early as *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) the Court made it clear that in matters regarding war and peace "we are one people." *Id.* at 413. In *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540 (1840), the Court addressed whether a state could constitutionally extradite a fugitive from a foreign country. In a separate opinion, Justice Taney declared his belief that the foreign affairs power resides exclusively in the federal government: "It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation . . . ." *Id.* at 575.

In the watershed *Chinese Exclusion Case*, 130 U.S. 581 (1889), Justice Field, writing for a unanimous Court, sustained the validity of a federal statute barring Chinese workers from entering the country. *Id.* at 606–07. A key portion of the Court's analysis revolved around the distribution of foreign affairs power under the Constitution.

> While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.

Id. at 604.

More recently, the Court reiterated the principle of federal exclusivity in *United States* v. *Belmont*,

301 U.S. 324 (1937). "Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government." *Id.* at 330. Based on this principle of federal exclusivity the Court struck down other State laws. *See Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941); *United States* v. *Pink*, 315 U.S. 203, 232 (1942).

This long line of decisions culminated in 1968, when the Court struck down an Oregon statute that established conditions under which non-resident aliens could take property through probate. *Zschernig* v. *Miller*, 389 U.S. 429, 430–31 (1968). The Court held that the law was an unconstitutional "intrusion by the State into the field of foreign affairs." *Id.* at 432. To arrive at this conclusion the Court reasoned that "state involvement in foreign affairs and international relations," *id.* at 436, was impermissible because they are "matters which the Constitution entrusts solely to the Federal Government." *Id.* The Court perceived, as the Founders did, "the dangers which are involved if each State . . . is permitted to establish its own foreign policy." *Id.* at 441. It also recognized that "[t]he several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* at 440.

IV. STATES CROSS THE FORBIDDEN LINE SEPARATING THE LEGITIMATE FROM THE UNCONSTITUTIONAL WHEN THEY CONDUCT FOREIGN AFFAIRS

While repeatedly affirming the federal government's authority over foreign affairs in the strongest

terms, this Court has nonetheless avoided rigidly excluding States from carrying out their reserved powers when doing so happens to create international controversy. In *Clark* v. *Allen*, 331 U.S. 503 (1947), the Court held that the foreign affairs power of the Constitution posed no bar to a California law that escheated the personal property of German citizens because Germany did not then grant American citizens the reciprocal right to inherit receive property. *Id.* at 516. The German heirs unsuccessfully asserted that the law violated the Constitution because it "seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance," a bargain that the Germans argued was "a matter for settlement by the Federal Government on a nation-wide basis." *Id.* at 516–17.

Relying on its holding in *Blythe* v. *Hinckley*, 180 U.S. 333 (1901), the Court rejected this argument as "far fetched." 331 U.S. at 517. Its reasons for doing so are significant. The Court first recited the principle that State law determines rights of succession unless preempted by treaty or federal statute. *See id.* Next the Court observed that "here there is no treaty governing the rights of succession to the personal property." *Id.* And it noted that California had not "entered the forbidden domain of negotiating with a foreign country . . . or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution." *Id.* Then the Court arrived at its famous conclusion: "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." *Id.*

The question bequeathed by *Clark* is this: where is "the forbidden line" separating valid from invalid exercises of State power? What features mark a State act as one that usurps the federal foreign affairs

power? To one side of the line stands what a lower court has called "the actual conduct of foreign affairs." *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990). On the other side lies "the great mass of local matters," *Chinese Exclusion Case*, 130 U.S. 581, 604 (1889), over which the Constitution generally reserves local control. The Court's opinions in *Clark* and *Zschernig* supply helpful hints, if not a precise mode of analysis, for marking out the boundary between them.

Relying on an implicit distinction between direct and indirect effects, the Court in *Clark* found that "[w]hat California has done will have some incidental or indirect effect in foreign countries." 331 U.S. at 517. Nonetheless, the Court refused to upend the law for that reason alone. In the Court's view, the law's "incidental or indirect effect" put it in the same league with "many state laws which none would claim cross the forbidden line." *Id.*

The majority opinion in *Zschernig* used the same distinction between direct and indirect effects to explain why the Oregon law did not survive judicial scrutiny, while the law in *Clark* passed muster. The Court explained that the Oregon law would have "more than 'some incidental or indirect effect in foreign countries.'" 389 U.S. at 434 (quoting *Clark*, 331 U.S. at 517). Because the Oregon law required courts to "launch[] inquiries into the type of governments that obtain in particular foreign nations," 389 U.S. at 434, the Court found that the law had "a great potential for disruption or embarrassment." *Id.* at 435. It found that such judicial inquiry into the political conditions of foreign countries "affects international relations in a persistent and subtle way." *Id.* at 440. Because the law had such effects, the Court concluded that it "has a direct impact on foreign relations and may well adversely affect the power

of the central government to deal with those problems." *Id.* at 441.

Justice Stewart's concurring opinion shed further light on how to identify when a State has crossed "the forbidden line." He pinpointed the law's fatal defect in the fact that it "would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments." *Id.* While Justice Stewart acknowledged the unremarkable necessity of the application of foreign law by State courts, he observed that "here the courts of Oregon are thrust into these inquiries only because the Oregon Legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves." *Id.* By doing so, he concluded, the law "launch[es] the State upon a prohibited voyage into a domain of exclusively federal competence." *Id.*

In *Clark* and *Zschernig* members of the Court primarily relied on the distinction between direct and indirect effects to identify "the forbidden line" distinguishing valid from invalid State laws. The difficulty with this distinction is that it is incomplete. Nothing in the Court's opinions explains exactly why one effect is indirect and another direct. In fact, the distinction standing by itself does not really explain why the decisions came out differently from each other. Moreover, given the Court's unsuccessful experiment with the same distinction in cases under the Commerce Clause, *see Wickard* v. *Filburn*, 317 U.S. 111, 120–25 (1942); G. Edward White, The *"Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 901 (1997), it does not hold great promise as a tool with explanatory power. But other courts have also addressed the problem of how to identify when a State has impermissibly ventured

into the field of foreign affairs, and their reasoning is helpful in elaborating a more complete and precise analysis.

In its decision holding that the Massachusetts Burma Law "interferes with the foreign affairs power of the federal government and is thus unconstitutional," *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), the First Circuit identified five reasons for concluding that the Massachusetts Burma Law "has more than an incidental or indirect effect on foreign relations." *Id.* These reasons include the following:

> (1) the design and intent of the law is to affect the affairs of a foreign country; (2) Massachusetts, with its $2 billion in total annual purchasing power by scores of state authorities and agencies, is in a position to effectuate that design and intent and has had an effect; (3) the effects of the law may well be magnified should Massachusetts prove to be a bellwether for other states (and other governments); (4) the law has resulted in serious protests from other countries, ASEAN, and the European Union; and (5) Massachusetts has chosen a course divergent in at least five ways from the federal law, thus raising the prospect of embarrassment for the country.

Id.

Note that the factors revolve around two analytical categories, purpose and effect. Factor 1 goes to whether the law has the purpose of conducting foreign affairs. Factors 2 through 5 go to whether the law has had the effect of conducting foreign affairs. In relying solely on questions of purpose and effect the First Circuit was traveling a well-worn path. Other courts addressing whether a State or local law

unconstitutionally exercises the federal government's power over foreign affairs have also relied on an analysis combining purpose and effect in some manner. *See, e.g., Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990); *Horman* v. *California*, 485 P.2d 785, 797-98 (Cal. 1971).

One danger lies in the possibility that reviewing a State statute for prohibited foreign effects will invite federal oversight in cases, like *Clark*, which do not warrant it. To minimize that possibility, we recommend giving greater weight to the purpose inquiry. At the same time, to avoid the problems of subjective intent, legislative purpose should be gauged by reasonably objective standards. International effects would then form a less weighty but supplemental means of determining when a State has strayed into "the actual conduct of foreign affairs." *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990). Based on the considerations that have guided other courts, the following questions are intended to assist the Court in determining when a State has exercised the foreign affairs power belonging to the federal government:

1. Does the law single out a particular foreign country (or countries)?

2. Does the law, either on its face or in its legislative history, contain substantial evidence that its purpose is to condemn or punish the target country (or countries)?

3. Has the target country, or have other foreign countries, retaliated or formally protested to the United States, or an international organization, and cited the law as justification?

These questions have been ranked in order of importance. That is, the more indispensable the factor is for distinguishing ordinary exercises of State power from impermissible forays into foreign affairs, the

earlier it appears. Applying these tests to the Massachusetts Burma Law, it becomes clear that the law strays well over "the forbidden line" and exercises the federal government's power over foreign affairs.

V. THE MASSACHUSETTS BURMA LAW UNCONSTITUTIONALLY ENCROACHES ON THE FEDERAL GOVERNMENT'S PREDOMINANT AUTHORITY OVER FOREIGN AFFAIRS

Under the Massachusetts Burma Law, every prospective contractor must provide a statement, under penalty of perjury, describing the nature and extent of its business ties with Myanmar. *See* Mass. Gen. Laws ch. 7,§ 22(H)(c). Except in a few narrowly defined circumstances, *see id.* at §§ 22(H)(b),(d), a company doing business with or in Myanmar may not provide goods or services to Massachusetts, and any contract in violation of the statute is void. *See id.* at § 22L. The law thus blacklists and then boycotts any company doing business with or in the Union of Myanmar, forcing companies to choose between doing business with Myanmar and doing business with Massachusetts. For four reasons the law crosses "the forbidden line."

First, the law singles out Myanmar on the face of the statute. In fact, the official name of the statute is "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)." *See* 1996 Mass. Acts 239.

Second, the law has the manifest purpose of condemning and punishing Myanmar. The legislative record contains statements by Representative Byron Rushing to this effect. He stated that the law set up a selective purchasing scheme because "if you're going to engage in foreign policy, you have to be very specific." *NFTC* v. *Natsios*, 181 F.3d 38, 46 (1st

Cir. 1999). More plainly still, he declared that the "identifiable goal" of the law was "free democratic elections in Burma." *Id.* At the signing ceremony, Lieutenant Governor Cellucci remarked of trade between Myanmar and the United States, "[t]oday is the day we call their bluff." *Id.* And Governor Weld himself, later commented that "it is my hope that other states and Congress will follow our example, and make a stand for the cause of freedom and democracy around the world." *Id.* Such blatant statements mark the Massachusetts Burma Law as a purposeful exercise in foreign affairs.

But even if no Commonwealth official had uttered a peep, the law as written unequivocally discloses the purpose of punishing Myanmar. The law comprises two key features: a blacklisting process and a secondary boycott.[4] "The law requires the Secretary of Administration and Finance to maintain a 'restricted purchase list' of all firms engaged in business with Burma." *Id.* at 45 (quoting Mass. Gen. Laws. ch. 7, § 22J). Once a company gets on that list, the law severely restricts that company's ability to do business with Massachusetts. *See* Mass. Gen. Laws ch. 7, § 22L. As a secondary boycott, extending beyond the targeted country to all companies doing business with the targeted country, the law undoubtedly punishes Myanmar by drawing away not only the $2 billion per year in purchasing power over which it has direct control, *see* 181 F.3d at 46, but also the purchasing power of every company who has chosen to do business with Massachusetts rather than Myanmar—companies whose annual revenue exceeds $246 billion. J.A. 219. Presenting companies with the choice of doing business with Myanmar or Massachusetts is the law's central purpose, as is true of any secondary boycott. Hannes L. Schloemann and Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO*, 93 AM. J. INT'L. L. 424, 428 (1999). Seen from this vantage point, it is a powerful "alternative to war." Br. Pet. 29.

Third, the law has attracted formal diplomatic protests from this Nation's major trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations (ASEAN). *See* 181 F.3d at 47.

By every one of these measures the Massachusetts Burma Law is no mere "diplomatic bagatelle," *Zschernig* v. *Miller*, 389 U.S. 429, 435 (1968). It uses the Commonwealth's procurement authority to impose a secondary boycott on a foreign country, thus reflecting a deliberate attempt to employ its economic muscle in the service of foreign affairs goals. No matter how enlightened or admirable these goals may be, the Constitution delegates the predominant authority over foreign affairs to the federal government—not to the States.

[4] A secondary boycott, in the context of foreign affairs, is defined in the following terms:

> In a secondary boycott, state A says that if X, a national of state C, trades with state B, X may not trade with or invest in A. In other words, X is required to make a choice between doing business with or in A, the boycotting state, and doing business with or in B, the target state, although under the law of C where X is established, trade with both A and C is permitted.

Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L. L. 419, 429–30 (1996). Such boycotts attract heavy criticism, even when enacted by Congress. *See id.* at 433–34.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Daniel J. Popeo
R. Shawn Gunnarson
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for *Amicus Curiae*

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